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MOTIONS AND RULES

AT

COMMON LAW

ACCORDING TO THE PRACTICE OF

THE COURTS OF COMMON PLEAS OF PENNSYLVANIA

BY

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CHIEF JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA

SECOND EDITION

ENLARGED AND ANNOTATED TO 1906

BY

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PREFACE.

The original address by Chief Justice Mitchell, then one of the Judges of Common Pleas No. 2 of Philadelphia, before The Law Academy of Philadelphia on May 15th, 1879, has long been out of print, and the changes in practice since that time being considerable, the whole work while still retaining the main features of the original, has been revised, enlarged and brought down to date, under the supervision of the author, by the undersigned.

WILLIAM D. NEILSON.

February, 1906

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MOTIONS AND RULES AT COMMON LAW.

I.

1. Motions and rules may be defined in a general way as instruments or means of facilitating the progress of a cause or the transaction of the business of litigation, by correcting clerical slips, or amending errors not fatal; by accommodating the case to changes of circumstances since its commencement; by meeting exigencies unforeseen or unprovided for; by removing difficulties in the development of the case which stop progress; or by advancing the case in any way towards its final and proper disposition.

"A motion is an application to a court by a party or his counsel; and the order made by a court on any motion, when drawn into form, is called a rule. A motion is either for a rule absolute, in the first instance; or, it is only for a rule to show cause; or, as it is frequently called, a rule *nisi,* which is afterwards discharged or made absolute by the court, on argument. By the general practice, all motions made by counsel must be put in writing, and delivered to the prothonotary, to be entered on the minutes and filed; the time of delivery to be indorsed by the prothonotary. Motions are of a civil or criminal nature; rules for attachments are the only criminal rules granted which have any relation to a civil suit. On a motion for a rule to show cause, depositions on the adverse side will not be received; when the rule

applied for is granted, upon proper grounds shown, the adverse party, with his depositions, will be fully heard on the argument. The affidavit of a party is sufficient to lay a ground for a rule to show cause." *Troubat & Haley Prac.*, sec. 1469, p. 852, (1880). This is a comprehensive definition and its accuracy is vouched by the practice which has maintained until the present day. The motion is the request for the court's action, the rule is the action which follows exactly as it is asked; in the great majority of instances the motion is granted, always in rules which are either of course or absolute in the first instance, *e. g.:* rules for judgment by default or confession on warrant of attorney; and rules *nisi*, that is to say absolute, unless the party to whom the rule is directed shall show cause for the discharge of the rule.

2. Action on rules by the court itself without suggestion or motion by counsel occasionally takes place in the course of trial of a cause, as, for example, the withdrawal of a juror, a continuance, a commitment for contempt of process, the issuing of an attachment, etc., and motions by counsel are sometimes made in open court, but even these are not exempt from the requirement that they be accompanied by a written memorandum of the motion.

3. At common law when pleading was *ore tenus*, and the nimble-witted counsel shifted his ground from point to point before the court as freely as a dexterous swordsman in the ordeal of battle; when a special demurrer was still as fatal as the thrust of a rapier, and issues either of law or fact were single and simple, the office of rules was extremely narrow and unimportant. If emergencies arose in the case too great to be met and settled off-hand, resort was had to the *audita querela*, the writ of error *coram vobis*, the *scire facias*, and other

supplementary writs, and finally to the bill in equity. In modern practice the *audita querela* and error *coram vobis* have almost disappeared, and for these, as well as for other remedies, we have substituted the shorter, less formal, and more convenient process of rules. This is the tendency of modern practice in all common-law countries, but in Pennsylvania the scope and usefulness of rules have been especially enlarged by the absence for so long a time of a court of chancery, and the consequent development of equitable principles and equitable relief under the forms of the common law. In Pennsylvania, therefore, it may be said without too rash a generalization, that the object and office of a rule are to meet any emergency and remove any difficulty which is not fatal but which stands in the way of the regular and speedy progress of a cause.

4. The scope of rules, however, is not without well-defined limits. In general, it may be said, *first*, that a rule will not be granted to any one except a party or privy, or one having some legal interest or standing in a pending proceeding (see *Buck* v. *Boland*, 1 W. N. C. 6 (D. C. 1874); *Silk Co.* v. *Disston*, 7 W. N. C. 63 (C. P. 2, 1879); and cases *passim* of rules by terre-tenant, etc., to intervene *pro interesse suo*), and, *secondly*, that before a court can grant or enforce a rule against any party it must have acquired jurisdiction over him by some regular and recognized legal process. The party must be in court within the contemplation of the law, either actually, as party, witness or juror (or even spectator for purposes of enforcement of order by punishment for contempt, etc.), or constructively, as an officer of the court, including attorneys, inferior magistrates, etc. In other words, a rule is not properly original process in any case, but is auxiliary, and for the facilitating of jurisdiction already acquired.

5. This limit to the proper function of rules requires special attention at the present time, from an apparently growing tendency to enlarge their operation in certain classes of cases, such as the addition of supplementary parties, *e. g.*, partners, husband, etc., in actions previously pending. This tendency arises undoubtedly from the failure sometimes to distinguish accurately between the power of amendment and the acquisition of jurisdiction over the parties put upon record by the amendment. Thus in *Leonard* v. *Parker*, 72 Pa. 236 (1872), the court below had, after the return of the writ, added the name of Parker as a defendant without notice to him. This was an unquestionable exercise of the power of amendment, and as such was approved by the Supreme Court; but an unfortunate expression by the late Chief Justice Thompson in delivering the opinion of the court, that "the party must be brought into court by an alias summons, or perhaps by a rule to appear and plead," seems to give support to the notion that a rule would in such a case have been sufficient to bring the person within the jurisdiction of the court. And following this supposed intimation of *Leonard* v. *Parker*, the court in *McGlinn* v. *Johnson*, 1 W. N. C. 312 (C. P. 1, 1876), is reported as if it had treated a sworn service of a rule upon a new party as equivalent to a summons, though the report is not entirely clear as to whether the court meant to do anything more than add the name of the new defendant to the record, a right that is entirely beyond question. This cannot be done in a suit commenced by *capias: Britton* v. *Schlop*, 9 W. N. C. 510 (C. P. 3, 1875).

The cases of *Dunn* v. *Duncan*, 2 W. N. C. 81 (C. P. 3, 1875), and *Ward* v. *Whitney*, 7 W. N. C. 95 (C. P. 1, 1875), stand upon a somewhat different footing, as in them the court had jurisdiction *in rem*, by foreign attachment, and by levy under execution.

The true line of distinction and the proper practice is indicated by the Supreme Court in *Dusenberry* v. *Bradley*, 6 W. N. 413, (S. C. 1879) where it is said by Sterrett, J.: "It was quite proper for the court to allow the amendment, and make Murphy a party defendant in the suit. If Murphy had been in court, or if a writ had been issued and returned *non est inventus*" (*nihil habet*) "as to him, the defence set up would have been fully met by the amendment; but he never had a day in court," etc. See also *Schweinberg* v. *Paul Lodge*, 7 W. N. 48, (C. P. 2, 1879). *Brittin* v. *Shloss*, 9 W. N. C. 510 (C. P. 2, 1880); *Hirsch* v. *Kohn*, 10 W. N. C. 237 (C. P. 2, 1881; and *Sheba Lodge* v. *Berry*, 17 W. N. C. 223 (C. P. 1, 1885). But see *Bussenger* v. *Wernwag*, 8 D. R. 263 (C. P. 1, 1899).

6. The ease with which an adjudication of the rights of parties either interlocutory or final can be had by a rule tempts practitioners now and then to ask too much: in *Evans* v. *Maury*, 17 W. N. C. 377 (S. C. 1886), the court was asked to enter an order on the sheriff to deliver a deed, after acknowledgment in court and thereby constructive delivery to the vendee, for cancellation. The rights of the vendee could not be jeopardized in so summary a way as he was not a party to the cause—and this even though he were plaintiff in execution—and the rule was discharged. Plaintiff's remedy of course was in ejectment. *Maslin* v. *Gerault*, 19 Pa. 124 (1852), is another example of an abortive effort to make a rule do duty of another action and doubtless to save the costs of a discontinuance: see also *Fischer* v. *P. R. R. Co.*, 2 Pa. C. C. 245 (1896).

7. Courts have no power to extend the time within which an affidavit of defence must be filed under the procedure act of 1887; but the same reasons for doing so can

be successfully set forth in a petition for a rule to show cause why a judgment for default of such should not be opened.

There are cases where by statute a rule may be used with the effect of original process as *e. g.*, proceedings in an interpleader under the Act of May 11, 1836: *Laughlin* v. *McCormick*, 2 W. N. C. 352 (C. P. 2, 1876); rule for an issue in sheriff's interpleader, Act May 26, 1893, P. L. 95. See *post*, page 88, Rules provided for by statute. But these cases are few in number and depend upon positive statute, so that they are exceptions only in appearance, and fall strictly within the general principle asserted, that jurisdiction must be acquired over a party in the first instance by some regular and authorized legal process.

II.

Motions.

The following motions are made in open court *in banc* or at the time of trial:

1. To admit to membership in the Bar.

2. For the appointment of a guardian *ad litem*.

3. To transfer a case to another court. (Where jurisdiction has attached upon the same or a similar issue between the same parties, the motion is to transfer to the former court and is always made to the second tribunal).

4. By the sheriff to hear acknowledgment of his deeds poll.

5. For final decree in divorce.

6. For a continuance of the trial.

7. To withdraw a juror.

8. For a *nonsuit*.

9. For judgment on reserved points of law. (The court cannot enter judgment without the motion for it is on the refusal to grant the motion only that an appeal can be taken).[1]

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[1] See Rules C. C. P. Philadelphia, Rule 27.

10. For judgment *non obstanto verdicto.*[2] Or in arrest of judgment.

    Some motions are made to the court through the clerk by filling them with him.

11. To appoint a master in an application for a charter.

12. To appoint an auditor of a trustee committee in lunacy, etc., account.

13. To appoint a master in partition.

14. To appoint a master in divorce.

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[2] To allow the court to enter judgment *n. o. v.* the record must show the question of law clearly stated and properly reserved and the facts upon which it is based must either be admitted of record or found by the jury. *Henry* v. *Heilman,* 114 Pa. 449 (1886); *Currier* v. *Bilger,* 12 Pa. C. C. 348 (Clearfield, 1892). For a complete and the latest discussion of the subject see *Casey* v. *Penna. Asphalt Co.,* 198 Pa. 348, and 490 (1901).

It is customary to couple this motion for one for a new trial. *Gordon* v. *Norton,* 186 Pa. 168 (1898).

III.

Rules may be either peremptory, *i. e.*, absolute in the first instance, or they may be to show cause, or in the language of the English books, rules *nisi*. The first class includes only those that are to compel the performance of a fixed and indisputable duty, made imperative by statute, by general rule of court, or by the settled course of legal procedure. They are not numerous, and the chief examples to be met with are rules on the sheriff to return a writ (when the return day has passed) or to pay into court the proceeds of the sale of real estate, rules on counsel to file his warrant of attorney, rules to declare, plead, etc., rules for bill of particulars, and rules to take depositions within the times limited by the rules of court.

These rules, which are absolute in the first instance, are entered in the prothonotary's office on motion of counsel, and do not come before the court at all, unless brought up specially in connection with subsequent proceedings.

The second class, to wit, rules to show cause, is, as already said, by far the most numerous and important, and it is to these that our attention is principally to be directed.

As to the former; by rule 23, section 1, of the Rules of the Courts of Common Pleas of Philadelphia county, the prothonotary is authorized to entertain motions for and enter judgments "for default of any kind," and directs him to assess damages in all cases in which the "amount

thereof is set forth with certainty in the statement of claim filed" (see note to this rule, page 109, Rules of Courts of Common Pleas).

The following are the most common under this rule of court:

15. For judgment of *non pros.*[3]

16. For judgment by warrant of attorney. *Carter* v. *Shoener,* 5 Pa. C. C. 186, (C. P. 4, 1888).

17. For judgment against garnishees for failure to answer interrogatories. *Bank* v. *Lyon,* 8 D. R. 675, (C. P. 1, 1899).

18. For rule to take depositions.

19. For judgment for want of a plea.[4], [5]

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[3] The twelve months are to be computed from the date of service of the writ: *Ashton* v. *Bell,* 2 Pa. C. C. 483 (C. P. 3, 1886).

[4] This must be accompanied by an affidavit of service of copies of statement and rule to plead: *Kuhnle* v. *Moran,* 1 W. N. C. 19 (D. C. Phila. 1874); *Edwards* v. *Adams,* 16 W. N. C. 242 (C. P. 3, 1885); *Honeywell* v. *Tonery,* 5 Kulp, 360 (Luzerne 1889).

[5] This judgment cannot be taken before the return day of the writ: *Bloomsburg Banking Co.* v. *Mowry,* 4 Pa. C. C. 247 (Columbia 1887). Nor in a suit for a penalty for no affidavit of defence therein is due; *Union Glass Co.* v. *Bank,* 10 Pa. C. C. 565 (Lawrence 1890). Nor in a suit on a sheriff's official bond; *Barnhart* v. *Seanor,* 8 D. R. 18 (Westmoreland) 1898. Nor in an appeal from a magistrate's court as the act of May 25, 1887. P. L. 271, does not provide for it; *Locher* v. *Sensenig,* 9 D. R. 704 (Lanc. 1900).

In *Taylor* v. *Nyce,* 3 W. N. C. 433 (C. P. 4, 1877), a paper

20. For want of an affidavit of defence.[6]

21. For want of an appearance.[7]

22. On sheriff to pay proceeds of sale of real estate.

23. For bill of particulars in divorce under Act May 25, 1878, P. L. 156.

24. For judgment for defendant in default of *scire facias* sur mechanic's lien. Under Act June 4, 1901, P. L. 434, Sec. 7, or municipal claim Act June 4, 1901, P. L. 367, Sec. 16.

25. To assess damages *sur* judgment.[8]

The following rules which are of course, and issue on

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was filed prior to the motion, which was plainly for the purpose of preventing judgment for default, the court inspected the paper and determined it was irrelevant and frivolous and entered judgment in default. But it would seem this was at variance with the practice as the proper procedure would be for plaintiff to take a rule for judgment for want of a sufficient affidavit of defence.

[6] May still be had notwithstanding act of May 25, 1887, P. L. 271: *Humphrey* v. *Smith*, 4 Pa. C. C. 169 (No. 1, 1887).

[7] Judgment cannot be entered if an affidavit of defence has been filed: *Philadelphia* v. *Hopple*, 2 Pa. C. C. 543 (C. P. 3, 1886); *Conley* v. *Zweighaft*, 7 D. R. 87, (C. P. 3, 1898). Nor if defendant has constructively appeared by taking some steps in process; *Gallager* v. *Glascow*, 13 W. N. C. 194 (C. P. 2, 1883), or unless he has been actually served with copy of statement; *Hafleigh* v. *Winpenny*, 9 W. N. C. 138 (C. P. 1, 1876)

[8] The prothonotary has no authority to assess damages except in cases specified by act of assembly or rule of court: *Lewis* v. *Bonnert*, 12 Pa. C. C. 366 (Lack. 1892).

motion of counsel, filed in the prothonotary's office are of the most frequent occurrence in our practice.

1. Rule on the sheriff to return a writ.

2. Rule on the sheriff to pay into court the proceeds of sale of real estate.

3. Rule to show cause why sheriff's sale should not be set aside when filed by an exceptant to a special return under Rule of Court 36 § 5.

4. Sheriff's rule for interpleader.[9]

5. Rule to show cause why writ should not be quashed. (For matter appearing on the record.)

6. Rule to show cause why service should not be set aside. (For matter appearing on the record.) *McCann* v. *Ins. Co.* 10 D. R. 560 (Lack. 1901).

7. Rule to show cause why sheriff's return to writ should not be struck off.

8. Rule to show cause why mechanic's lien or municipal claim should not be struck off for irregularity appearing on the face of the record.[10]

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[9] Will be made absolute if entered in good faith; no affidavit is necessary in support of the rule—But a contest of the rule must be by sworn answer; *Waterman* v. *Langdon,* 15 Phila. 211 (Phila. 1882).

[10] *Bank* v. *Rush,* 2 W. N. C. 186 (C. P. 4, 1875), the court is reported as saying that "this is by no means a rule of course," and as discharging the rule because it had not been allowed. The practice to-day does not require an *allocatur* under such circumstances.

9. Rule to show cause why appeal should not be struck off.

10. Rule to file affidavit of amount claimed under a mechanic's lien. (Under act of 4 June, 1901, P. L. 431.)

11. Rule to show cause why a *scire facias* should not be issued in a mechanic's or municipal claim. (Under acts of 4 June, 1901, P. L. 367, 431.)

12. Rule to show cause of action where suit commenced by *capias* or attachment.

13. Rule to show cause why defendant should not be discharged on common bail.

14. Rule to show cause why attachment should not be dissolved.

15. Rule to show cause why bail should not be reduced.

From a subsequent report of what seems to be the same case, *Rush* v. *Bank*, 2 W. N. 263 (C. P. 4, 1875), it appears that the rule was not founded on the record as it stood, alone, but on grounds of the contract, as shown by depositions. As applicable to the case in hand, therefore, the language of the court was undoubtedly accurate. Whenever the relief asked is founded on extrinsic facts to be shown in the first instance by affidavit and subsequently by depositions, the rule is not of course, but must be allowed. But the expressions of the court must not be applied to cases where the rule to strike off the lien is founded on the facts as they already appear of record. There are certain objections to the regularity of a mechanic's lien which can only be made by demurrer or motion to strike off (see *Shields* v. *Garrett*, 4 W. N. 140, C. (C. P. 4, 1877); *Humphries* v. *Addicks*, Id. 88 (C. P. 1, 1877), and cases there cited, and the judgment of the court thereon is matter of right of which a party cannot be deprived by the refusal of an *allocatur* to his rule.

16. Rule to justify security.[11]

17. Rule to show cause why security should not be struck off. (For matter appearing on the record, as in *Showaker* v. *Kelly,* 2 W. N. 95 C. P. 2, 1875).

18. Rule on behalf of counsel to show cause why he should not withdraw his appearance.

19. Rule on counsel to file his warrant of attorney.[12]

20. Rules to declare, to plead, to reply, etc., within the time limited by the rules of the court.

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[11] This was a rule of course under the common-law practice when security was taken by the prothonotary or the sheriff. In the present practice in this county under the act of 10th April, 1873 (P. L. 776), requiring bonds of indemnity to the sheriff to be justified before and approved by one of the judges in the first instance, and under the rule of court requiring an affidavit by the surety (rule adopted October 2d, 1875, 32 Legal Int. 362, and amended form of affidavit, 34 Legal Int. 216), it is probable that the practice will be changed in these cases, and an *allocatur* be required for a rule which practically compels the surety to justify a second time. Such a rule, however, will always be allowed upon any ground shown to suspect that the security is not real and ample for the purpose required, and especially in those cases where it was approved without notice to the other side. (See amendment to Rule 10, Sec. 3.)

[12] In *City* v. *Strawbridge,* 4 W. N. C. 215 (C. P. 4, 1877, counsel proceeded with unusual caution by a *motion* for a rule, and the court is reported as deciding the case, after consideration, upon the motion. No question, however, seems to have been raised as to the method of proceeding. By the act of 14th April, 1834, sect. 71, the attorney *shall,* if required, file his warrant, etc., and by the established construction of that act it is matter of right if applied for in time (see *Campbell* v. *Galbreath,* 5 Watts, 426; *Mercier* v. *Mercier,* 2 Dall. 142). No preliminary motion is required, and it is a rule absolute in the first instance and stays proceedings. *Reese* v. *The Church,* 1 W. N. C. 416 (C. P.

21. Rule to show cause why rule to declare, to plead, etc., should not be struck off as improvidently entered.

22. Rule to furnish a bill of particulars.

23. Rule to show cause why a more specific bill of particulars should not be furnished.

24. Rule to show cause why plaintiff should not be allowed to amend his bill of particulars.

25. Rule to show cause why nonsuit should not be granted, or the common counts struck out, for failure to furnish a bill (or a more specific bill) of particulars.

26. Rule on garnishee to answer.

27. Rule on garnishee to show cause why he should not make a more specific answer.

28. Rule to show cause why narr, pleas (or pleadings generally), should not be struck off.

29. Rule to show cause why plea of freehold should not be struck off.

4, 1875). There does not seem to be any case in which the right has been at all in question, the contest always being on the *sufficiency* of the warrant filed in obedience to the rule. See *Miss. R. R. Co.* v. *Southern R. R. Association*, 8 Phila. 107; *Citizens' Bank* v. *Keim*, 1 W. N. C. 263 (C. P. 1, 1875). *Hess* v. *Hess*, 1 W. N. C. 194 (C. P. 4, 1874).

30. Rule to justify plea of freehold.

31. Rules for a commission, or to take depositions, at the times and in the modes prescribed by the rules of court.[13]

32. Rule to show cause why judgment should not be struck off.

33. Rule to show cause why judgment should not be entered for want of sufficient affidavit of defence.

34. Rule to show cause why judgment should not be entered for amount admitted in the affidavit of defence.

35. Rule on garnishee to show cause why judgment should not be entered for the amount admitted in his answers.

36. Rule on garnishee to show cause why judgment should not be entered for default, for not making more specific answer.

37. Rules in divorce, to answer, for divorce, etc.

38. Rule for a new trial.

39. Rule to take off nonsuit.

It may be well to note that while some of these rules, such as the rule on counsel to file his warrant of at-

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[13] Rules giving shorter notice to the other side, or in any way varying the requirements of the rules of court, must be specially allowed. *McGuigan* v. *Swayne*, 1 W. N. C. 41 (D. C. 1874).

torney (*Reese* v. *The Church*, 1 W. N. C. 416, C. P., 1875) rules for bill of particulars, etc., operate in the nature of a stay of proceedings pending the rule, yet in many of them the stay is not of course, and if important should be applied for specially and allowed by the court. This class of rules include all these which are peremptory in the first instance and also many of those to show cause.

IV.

Rules may again, regarding them from another point of view, be divided into two classes, namely, those which are entered of course on the order of an attorney, and those which require to be allowed by the court or judge. This division of rules is one of considerable practical importance, and, speaking from recollection of my own experience at the bar, is the cause of some embarrassment to young practitioners. Yet I am not aware that any effort has been made in any of the books to classify rules on this basis, or to determine any principle upon which such a classification might be made.

In the absence, therefore, of any assistance from the labors of my predecessors on this point, it is with some hesitation that I venture to suggest as a basis for such a classification the very general principle, that where any duty is made imperative on the other party by statute, or the rules of court, or the settled course of legal procedure, or where, upon *the status of the proceedings as shown by the record,* the party claims to be entitled of right to the relief sought, in all such cases a rule may be entered of course by the attorney without an *allocatur.*

Such a generalization is perhaps too vague to be of very much practical usefulness to a young lawyer with the necessity of knowing at once for a case in hand whether he must get his rule allowed or not; but it is made as a contribution towards the ascertainment of a satisfactory principle, and in the hope that it may be at least a first step in the right direction.

LAW DEPARTMENT.

V.

1. Coming now to the other and far larger class of rules which require an *allocatur*, the first observation that occurs is, that there must be ground laid by petition setting forth the facts upon which the relief is sought, and must be sustained by affidavit of the petitioner of the truth of the facts alleged. About the time the address before the Law Academy, May 1879, was delivered, a practice had obtained among certain lawyers who held commissions as notaries public of attesting affidavits of their clients in litigation, which called forth the comment on page 20 of "Motions and Rules at Common Law," and probably had not a little to do with the Court of Common Pleas adopting Rule 2, which forbids such practice and makes the nullity of an affidavit so taken the penalty for the breach of the rule.

2. The petition for the allowance of the rule should be a concise statement of the facts upon which the application is based, avoiding argument. It is not necessary to go into all the facts with the same detail as would be required in a deposition, but it is safer to err on the side of fulness rather than risk the omission of a fact that may be material. However, except affidavits of cause of action, a petition for a rule may be amended.

If any part of the pleadings is involved a copy of the particular instrument should be appended. Where the rule applied for is to show cause why a judgment entered for default of an affidavit of defence should not be opened and defendant permitted to file his affidavit, a copy of it must be made part of the petition and at the return of the rule the court will take into consideration the sufficiency of the affidavit in discharging or making absolute the rule. *Hunter* v. *Forsyth*, 205 Pa. 466, (1903).

When the application for the rule is made under the provision of a statute: *e. g.*, to enter security in lieu of a municipal claim under sec. 15 Act June 4, 1901, P. L. 367, the petition must conform with the words of the act, or rather, unless the facts relied on in support of the rule be in exact conformity with the conditions imposed by the statute, the court does not acquire jurisdiction to entertain the rule and the same, if improvidently granted, will be struck off on application by another rule to that end.

3. The decree as desired by the petition should be added to the petition that the court may be saved the trouble of drawing it, and if a stay of proceedings is desired this should be incorporated in the rule. A stay of proceedings is always the subject of *allocatur* and even if it be a rule of course, where a stay is needed it must be allowed else it is of none effect, and its unauthorized addition may imperil the rule itself. Having properly prepared the petition, had it sworn to, the next step is to present it to a judge of the court at chambers, for only in cases of extreme necessity should counsel interrupt the course of a Jury trial by handing up his petition.

But the best method is to leave the paper with the

Clerk of the Court to hand to one of the judges for his action.

4. The rule having been granted the original is filed with court clerk who puts it down on the Current Motion List of the day to which the rule is made returnable, being the next ensuing Monday if the date of entry is not less than forty-eight hours prior, sometimes the Court will fix a later day for the return if the circumstances are deemed to justify it. It is better to apply for the rule, where an *allocatur* is necessary, or to enter it where it is of course, as early in the week preceding its return as possible and if feasible gather the material for the paper book before the rule is entered, so that the argument may be had when the case is called. Having entered your rule, if of course, or when it is allowed, if not, send a copy together with the reason for entering it to the counsel of record on the opposite side. In the case of an *allocatur* a copy of the petition upon which the rule is granted should be given him in order that an answer may be filed when it is necessary to deny the facts of the petition.[14]

5. While the etiquette of practice and the sanction of custom demand that opposing counsel shall have notice of the return day of a rule, *i. e.*, when the question raised is to be argued—to show cause, it is not necessary to notify him of intention to move for judgment for default for the state of the record demonstrates whether the

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[14] Where a rule is taken in open court it is unnecessary to give notice of its return to opposing counsel: *Hillaker* v. *Kinzua Pad Co.*, 13 D. R. 435 (Warren 1903).

motion can prevail or not. But even though notice is not by law required, in certain cases, where there is merit in the position of the side of the cause against which the rule is taken, it is not a work of supererogation and may be the saving of much trouble, to warn opponent counsel of the intention to act. It is not always wise to take advantage of an opportunity to take judgment for default, such judgments are readily opened and the process entails more trouble upon an eager litigant than if he had reminded his adversary of his delinquency and permitted the case to be measured by its merits and determined thereon. The courts of to-day insist on the administration of substantial justice, and parties can no longer be deprived of their "just rights" by the relentless application of technicalities, the delight of the sharp practitioner and the revel of the pettifogger.

6. As has been stated before (*ante* p. 2), all motions for rules as well as the rules themselves must be in writing for the obvious purpose of insuring accurate docketing and preservation for future reference or use as parts of the record.

7. Having prepared the rule and reason, therefor, or in the case of an *allocatur*, had it allowed, leave the original in the Prothonotary's Office in the receptacle placed for the purpose by the clerks of the five courts, or else hand it to the appropriate clerk and serve a copy upon opposing counsel where service of notice of the rule is required, this is a sufficient compliance with the requisition except in case of a rule to show cause why an attachment of the person should not issue: this being a proceeding looking to the punishment of the party to whom the rule is directed, even though he has ap-

peared by counsel, the notice must be served on him personally.

8. While as a general rule, application for an *allocatur* is made *ex parte*, yet the court may direct notice to be given to the other party of an intention to apply.

9. Rules peremptory or absolute in the first instance, as already said, do not come before the court at all, but are entered by the prothonotary, and, if not obeyed, are enforced according to their nature, by a second order of counsel, as to enter nonsuit for want of a statement, or judgment for want of a plea; or by a subsequent rule or proceeding founded upon the first, as a rule for an attachment for not returning a writ, etc.

10. Rules to show cause, on the other hand, are placed by the court clerks on the appropriate lists, and upon the return day are called by the court for the hearing. The regular return day is the Monday following the granting of the rule, and no other return day is ever allowed except in special cases and for very urgent reasons. It is, however, within the discretion of the court to fix an earlier day if the urgency of the case requires it; and there are a few exceptional cases where statutes or long-settled practice have required a longer time for the running of the rule. Thus the rule to produce books or papers at the trial under the act of 27th February, 1798, is by long-settled practice a thirty day rule. These, however, are rare and exceptional cases, and in a general consideration of the subject may be safely disregarded.

11. Rule 26, sec. 1, (Rules Courts of Common Pleas, Phila., p. 117), provides that "Motions and Rules shall

be entered on the Current Motion List, which shall be called on the regular motion-day in each week. Any Rule on the Current List which the counsel for either party shall insist upon having heard, shall be disposed of, unless cause be shown to the contrary."

Monday has been for several years the day on which the Court *in Banc* convenes to hear the Current Motion list, and once a month, the third or fourth week of the month, is devoted to calling cases undisposed of on prior Current Motion lists, the General or Miscellaneous Argument and other lists.

By an amendment of section 4, Rule 26 of Courts of Common Pleas of Philadelphia (page 118) it is provided that "The Current Motion list shall be called but twice, and all other lists three times. On the third calling all cases not answered to shall be finally disposed of: that is to say, Rules for New Trials, to take off *nonsuits*. Rules for New Trials and Judgments on points reserved shall be considered as submitted without argument, and decided upon the report of the judge before whom the case was tried. Rules for Judgment and all other Rules *Nisi* shall be discharged for want of prosecution."

The Practice now followed in the five Courts of Common Pleas of this County in respect to the Current Motion list, is as follows:

Court Number One: If the case is unanswered to by either party at the time it first appears on the Current Motion list it passes to the next "Undisposed of Cases on prior Current Motion lists."

If at its first appearance it is continued, it will be put on the next ensuing Current Motion list.

Court Number Two: In the first alternative the case awaits the ordering on any succeeding Current Mo-

tion list, by counsel of which the opposing counsel must have notice.

In the second alternative, same as Court Number One.

COURT NUMBER THREE: In the first alternative it is struck from the list but may be ordered again on any subsequent Current Motion list.

In the second: same as Court Number One.

COURT NUMBER FOUR: In the first alternative, it goes forthwith to the next "General Motion list," peculiar to this Court where if not answered to, it is discharged on third call.

In the second: same as Number One.

COURT NUMBER FIVE: In the first alternative same as Number Two.

In the second: same as Number One.

12. Under the authority of Court Rule No. 26, (*supra*), when a case is called on the Current Motion list of the day it is returnable, it is the right of either party to insist on the argument taking place, but the Courts are very lenient as to the weight of the "cause shown to the contrary" which moves the Court to continue the matter. The Court will not take up the case *ex parte* at the first call but if the absentee persists in his absence at the second call, on demand of the party present the Court will hear the case. It is questionable whether it is good policy to insist on an *ex parte* argument, first of all the court anxious to do justice will in a measure protect as far as is possible, the suitor unrepresented, and in close cases this may develop a course of reasoning in the mind of the Court, which may result in the prevailing of the absent litigant. But besides this, even if counsel who presses for argument, is suc-

cessful, he will be apt to have to defend against an attempt to open the judgment, which entails delay and trouble. Where depositions are required a continuance will be granted pending their being taken, and, under the present practice this continuance may be had until both sides have concluded their testimony when the cases can be again put on the list.

13. The rule being on its appropriate list and ready for hearing, it is the duty of the party who is entitled to begin (as to which see *infra*, p. 32) to furnish each of the judges with a paper book.[15] *This rule is imperative*

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[15] The origin of the term *paper book* not being perhaps generally understood, and being not unfrequently thought to be (like Pamphlet Laws) a peculiar Pennsylvania idiom, it may be interesting to note it here, especially as it supplies an illustration of the indebtedness of the junior bar to Lord Mansfield. By the ancient practice of the English courts on motion days the court began by calling upon the senior barrister present to move, and after he had been heard then the next in seniority, and so on through the bar as far as the day's sitting would permit. This custom it may be observed continued down to our own day in the courts of our conservative neighbor, New Jersey. The next day the same process was repeated, starting with the senior again, and thus it frequently happened that several days or even weeks would elapse before some of the juniors, no matter how urgent their cases, could get a chance to be heard. Lord Mansfield observing the hardship, changed the practice by beginning the call on the next day with the barrister whose turn it would have been to move next at the adjournment, and thus going through the entire bar before returning to the senior. He also ordered certain motions requiring argument to be put down on a *paper* or as we should call it now, a list, which the court would go through before entering on the general call of the bar. The days of hearing these matters came to be known as *paper days*, and the briefs required to be furnished to the judges in analogy to the demurrer and issue books of the previous practice, were called *paper books*. 1 Chitty's Archbold, 95; Tidd, 507; Campbell's Lives of the Chief Justices of England, vol. iii, ch. 34. It is well known that some of the most eminent of our Pennsylvania lawyers were

and has no exceptions. It is occasionally disregarded in merely formal matters not requiring argument, but it is liable to be enforced at any time without regard to the nature of the case or the action of the court in other cases of a similar kind.

The office of a paper book is to inform the court of the facts upon which action is asked, but it has also a subordinate office of recalling a case after it has been argued and comes up in consultation of the judges for decision. In the ordinary routine of the Monday lists cases are decided at once on the hearing, but even in the most frequent and common rules counsel may unexpectedly differ about the facts, doubts may arise upon the law, or difficulties be suggested which will induce the court to hold the case over for consideration, and in these instances a rather full paper book is absolutely necessary. It is never therefore safe in any case to come to a hearing without a paper book. The rule of court requires that it shall contain "a full and distinct statement of all facts conducive to a ready apprehension of the matter to be argued." In addition to this it is generally useful where the case requires argument at all to have a brief memorandum of the points upon which reliance is to be made. Many rules, especially to open judgment or set aside execution, involve a considerable amount of depositions. It is not of course desirable that the paper books should be incumbered with an extensive *résumé* of all the testimony, but a short skeleton of the facts claimed to be proved is always a desirable, and frequently an indispensable guide to the real points

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students in the Middle Temple during Lord Mansfield's time (among them Judges McKean and Yeates, Edward Tilghman Jared Ingersoll, and William Rawle), and it is probable that they brought the term paper books home with them, and fixed it in Pennsylvania law.

in issue. Again, not unfrequently a rule such as that for judgment against a garnishee, may involve a large amount of writing, and yet the key of the whole may be in a few lines containing the admission of assets in hand, and of course that is all the paper book need or ought to contain. Bearing in mind the office of a paper book, to inform the court in the first place, or to recall to it subsequently all the facts necessary to a comprehension of the case, or to an intelligent following of the depositions as they bear on the points in issue, it will rarely be difficult to avoid on the one hand insufficiency of statement, and on the other unnecessary prolixity.

Rule 26, sec. 9 of the rules of court also require that paper books shall be written in a plain legible hand, or printed. What the penalty of disregarding this rule may be, is not stated.

Although this rule was adopted before type-writing was in general use, and while the instances of a hand-written paper book are now rare, yet the principle is applicable to type-written books, and even greater neatness is expected and exacted in the modern substitution for pen and ink "books." The Court of King's Bench under Lord Tenterden, though deciding a rule in the plaintiff's favor, refused him costs because his affidavit was written in a slovenly manner. *Banc* v. *Jones*, 8 Dowl. & Ry. 114. We have unfortunately no such rod in pickle for poor books, but it may be said that a little care bestowed on the legibility and neatness of a paper book will not be wasted. In the words of a distinguished Jurist, "I have known more than one case while I was at the bar and since to be gained by the printing of an important covenant or other document whose full force the court was thus assisted in clearly and readily grasping."

The importance and value of exercising care and neatness in the preparation of paper books cannot be over

estimated. The attention of the Court is invited by neatness, and where this is a feature of the book, such a presentation of the case is apt to follow as to insure speedy at least, if not favorable disposition. Counsel would have less cause to complain of tardiness on the part of the Courts in determining matters brought before them on Motion or Argument lists, if their cases were presented to the court in attractive and intelligible form.

14. It is suggested that following the Rules of the Appellate Courts in the make-up of paper books would accomplish good results in this line. First, give the title of the case, follow this with a statement of the nature of the application or rule: this with a copy of the Docket entries: this with a copy of the rule together with, if an *allocatur*, a copy of the petition on which it was allowed or, if of course a copy of the "reason" for the rule: this by a very brief "history of the case:" this by a concise statement of the "question for determination" and this by the argument.

The argument should be a short presentation of the authorities upon which counsel relies: it is not wise to cite cases as supports, merely by title and place; select one or two authorities where the facts are in close resemblance to those of the case at bar and draw the parallel likeness of the cases.

Five copies of the paper book should be prepared, one for each of the judges, one for opposing counsel and one to be kept for counsel in support of the rule.

The counsel in opposition need not prepare so elaborate a "book;" his may be confined to a statement of facts, as his side views them, and an argument of similar proportions to that of his antagonist.

Copies of papers should be "single spaced" if typewritten and original matter, history of the case argu-

ment, etc., "double spaced." The "backing" of the book should be endorsed as if it were for filing in the record and should be endorsed as "Paper Book of Plaintiff (or Defendant). Sur Rule to ——"

15. As already said, rules which rest on the facts appearing on the face of the record, or the admitted writings in the case, do not require any affidavit. All other rules must be founded on affidavit. The affidavit, however, is not admissible as evidence at the hearing. *Coxe* v. *Nichols,* 2 Y. 546; *Hoar* v. *Mulvey,* 1 Binney, 145.[16] The objection made in those cases that the testimony of the *parties* is not admissible at the hearing is of course no longer tenable, but the *ex parte* character of affidavits is still sufficient to exclude them. All rules to show cause include authority to take depositions both in support of and against them (*Coulon* v. *De Lisle,* 1 Browne, 256); and in general depositions are required. Usually it is the duty of the party obtaining the rule to take depositions in support of it. He must give the opposing counsel forty-eight hours' notice of the time and place, and the latter is entitled to a reasonable time after these depositions are finished to take counter-depositions on his own side, if he desires so to do.

Depositions may, however, in any case be dispensed with, in the first instance, by agreement of counsel that affidavits may be read instead, and in special cases the court may entertain an affidavit as a matter of grace, though such a privilege is rarely accorded, and never except for sufficient cause shown.

On a rule to open a judgment taken for want of an affidavit of defence, on the ground that the failure to file an affidavit was an oversight of counsel, or some

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[16] See *Pearson's Petition,* 13 Lanc. Rep. 147.

accident or mistake not the fault of the defendant himself, it is now the usual practice to accept an affidavit of the cause of the failure and of the merits of the defence relied upon. The failure to file the affidavit in time being satisfactorily accounted for, the rule is treated in the first instance as if it were a rule for judgment for want of a sufficient affidavit of defence, and if judgment on such a rule would have been refused it is now opened. *Brady* v. *Wisler*, 2 W. N. C. 82, (C. P. 4, 1875). This, however, is subject to the discretion of the court to order depositions, either on the merits of the defence or on the cause of the failure to file the affidavit in time, should the court desire further or more specific information on the case.

It is also in the discretion of the court to order depositions on either side at any time, even though counsel have agreed to dispense with them.

16. The rule having been reached upon its appropriate list and called for argument, the party who has obtained the rule has the burden of proof upon him, and is therefore entitled to begin and conclude.

Rule 26, sec. 7. (Rules Court C. P. Phila.) provides than on Motion List Cases but one counsel on each side may be heard, while in those on the argument list two on each side can address the court.

Rules to show cause of action and to dissolve attachments are said to be exceptions, and it is provided by section 6, rule 26, of the Rules of Court, that in those cases the party who is to show cause is to begin and conclude. These rules, however, which formerly made up so large a proportion of the lists as to require a special practice, have now become comparatively rare and of little importance and the distinction made in the rules of court is not now commonly observed. In fact, the present practice in regard to the order of argument

upon the hearing of the ordinary Motion List is exceedingly informal, and it is usual for the courts after looking at the paper books to indicate which side they desire to hear first, and to direct the course of the whole argument in their discretion, so as to reach the controverted and vital points of the case in the speediest way. In the absence, however, of any indication by the court, the regular form of proceeding is for the counsel who obtained the rule to begin and conclude. The Argument Lists containing demurrers, cases stated, etc., are conducted more formally, and counsel heard at greater length, and in the established order.

17. As already said, rules are commonly granted in the first instance, without argument, upon the presentation of affidavits making a *prima facie* case. The arguments for and against the rule are heard together on the return day, or when the case is reached. Rules for new trial, and rules to take off nonsuits are, however, exceptions. As to these, the English practice still prevails, and the party desiring a rule must enter a formal written motion for a rule (accompanied by his reasons) in the court office within four days after the verdict or nonsuit. A copy of the reasons must also be furnished *within the four days* to the judge who presided at the trial. This requirement, though frequently overlooked, is imperative, and is liable to be enforced at any time by a dismissal of the motion. The obvious purpose of the rule is to enable the judge to examine his notes, with his attention called to the reasons, while the matter is fresh, and thus to avoid what is always disagreeable, a conflict of recollection between the judge and counsel as to what took place at the trial.

The rule for a new trial is placed upon the New Trial Argument List next following the entry of the rule. Formerly the practice was either in the case of new

trials or nonsuit to make a motion for a rule for a new trial or to take off a nonsuit on a list entitled "New Trial Motion List" the motion was heard *ex parte* and if a rule to show cause were allowed why a new trial should not be granted, or a nonsuit taken off, was entered by the court of which notice was given to the opposing party by counsel for the rule which took its place on the next New Trial Argument List. The rule for a new trial is a real rule to show cause as understood in the English practice and in all the old books; that is the burden of showing cause is upon the party against whom the rule has been obtained and at the argument he is to furnish paper books and is entitled to open and conclude the argument.

18. By Rule 27 (Rules of Court of Common Pleas, Philadelphia, p. 123), motions for judgment on points reserved and in arrest of judgment are added to motions for new trial and to take off *nonsuit* in the requirement that they be made and filed with the reasons therefor within four days after the verdict, and a copy of the reasons furnished to the judge before whom the cause was tried and served on the opposite party within the four days.

Many years ago, in the old practice the taking of a bill of exceptions to the admission or rejection of evidence, or to the charge of the judge at the trial, was considered as a waiver of any right to a new trial upon the same point. Because it was thought to be giving the party the unfair advantage of two chances, one before the Court *in Banc* and one before the Appellate Court.

In cases of compulsory nonsuit under the act of 1836, a writ of error lies only to the action of the Court *in Banc* in refusing to take off the *nonsuit*. The reasons of exception, therefore, *must* be presented to the Court in *Banc*, and the practice in other cases of motions for new trial is now uniform with this. The errors of the trial

are now *always* included among the reasons for a new trial, and the Supreme Court have more than once intimated that where a court consists of more than one judge they are *entitled* to the opinion of the court *in Banc* before they should be troubled with a writ of error.

19. Motions for judgment *non obstante veredicto*, or on points reserved at the trial (under our act of Assembly of March 28th, 1835), are usually, and as a matter of caution ought always to be, accompanied by a motion for a new trial, and are placed upon the same list and heard in the same manner. Judgments on points reserved under act of Assembly (in analogy to the English motion for judgment *non obstante veredicto* on points reserved, in which, however, the reservation is always by consent) originated in the act of March 1st, 1825, in relation to the District Court of Philadelphia, and were not extended generally to the other courts of the commonwealth until 1863. A certain strictness was long observable in the treatment of them by the Supreme Court, and it sometimes happened that the rule for a new trial saved a case that would otherwise have been lost. Thus where judgment was entered by the District Court for the defendant on a point reserved, and the Supreme Court reversed it, the case was saved to the defendant by the motion for a new trial. *Harper* v. *Keely*, 17 Pa. 234 (1851). Moreover, it sometimes happens that in the hurry of a trial it is taken for granted that all the facts are uncontroverted, and therefore may be assumed as the basis of a judgment on the point reserved, while a more careful and deliberate examination upon coming to enter the judgment shows a gap in the admitted facts on the record, or a contest upon some of the evidence. See *Central Building Association* v. *Witzell*, 13 Phila. 54 (C. P. 2, 1879). For these reasons it is always the safer and better practice to join a motion for

a new trial with the motion for judgment on a point reserved. (See *Standard Co.* v. *Phœnix Insurance Co.*, 13 D. R. 77 (Berks, 1902; and *Currier* v. *Bilger*, 12 Pa. C. C. 348 (Clearfield, 1892).

20. For analogous reasons, a motion for a rule for new trial is usually joined with every motion in arrest of judgment, and when so joined the two motions go upon the New Trial Argument List, and are heard together. The motion in arrest of judgment, however, is sometimes made alone, and in such case it goes upon the General or Miscellaneous Argument List. *Rohrbacker* v. *Pugh*, 10 W. N. C. 275 (C. P. 4, 1881).

21. A second rule, after the discharge of one of the same kind, is not allowed, unless in very exceptional cases, and when applied for, the fact of the discharge of a previous rule of the same kind should always be mentioned, and the special reasons for asking a second rule set forth. In default of this, the rule will be discharged without consideration of the merits. *Mitchell* v. *Pierce*, 1 W. N. C. 156 (D. C. 1875). Where rules have been discharged through unavoidable failure of counsel to be present, or where through misunderstanding the court has been erroneously informed that the rule was abandoned, or where the situation of the parties has so changed as to show on the present state of facts a new and strong *prima facie* claim to the relief sought, a second rule is sometimes granted, but only in exceptional and very clear cases.

Where counsel find at the hearing that, through some defect which they believe remediable, they cannot at present succeed, they should ask leave of the court to have the rule continued, or to withdraw it. A rule thus withdrawn is not a bar to a second rule of the same kind.

A rule may be withdrawn without leave at any time

before the argument, but after the argument has commenced the leave of the court must be obtained, as the matter being then *sub judice* is beyond the control of the parties. Leave to withdraw is rarely refused where there appears to be a good case and there is any fair prospect that the present objection may be obviated; but courts do not favor mere experiments or fishing inquiries. For example a rule to show cause why a rule to plead should not be withdrawn, *Richards* v. *Johnson,* 14 W. N. C. 273 (C. P. 1, 1884).

VI.

No exhaustive enumeration can be made of the various rules that may from time to time be required in the course of practice. They must be varied by the skill and ingenuity of counsel to meet the exigencies of new circumstances. But they all bear a certain family likeness, and have certain forms and features in common. A list of such rules as are more commonly found in practice collated from the various county court reports to date is now given and arranged as nearly as possible with regard to the subjects in groups.

I.

Rules relating to process.

1. Rule (on sheriff) to show cause why he should not make return to writ,[17]—execute a deed. *Gal-*

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[17] This rule as already mentioned is not to show cause, but is peremptory in the first instance, since the command of the writ is that the sheriff have it in court with his return on the day named, and he is therefore *prima facie* in default as appears by the record. If the sheriff fails to comply with the rule it is enforceable by attachment, but this is always a matter of discretion, and before granting it the court will hear the sheriff's reasons for not returning the writ, and if they are sufficient will enlarge his time or give other appropriate relief. As the sheriff, however, is always held to a strict performance of duty, the grounds which are sufficient for not returning a writ are very exceptional.

litzin B. & L. A. v. *Steiger*, 28 Pa. Super. Ct. 336 (1905).

2. Rule to show cause why *mandamus* to magistrate should not be awarded. *Com. ex rel.* v. *Smith*, 3 W. N. C. 95 (C. P. 4, 1876).

3. Rule to show cause why writ should not be quashed. *Bl'dg. Asso.* v. *Byrne*, 6 W. N. C. 253 (C. P. 1, 1878); *Comth ex rel* v. *Daily*, 3 W. N. C. 133 (C. P. 2, 1876); *Steinmetz* v. *Wade*, Ibid 187 (C. P. 4, 1876); *In re Apye*, Ibid 188 (C. P. 4, 1876); *Wheelan* v. *Stedman*, 7 W. N. C. 17 (C. P. 4, 1879); *Murphy* v. *Sheafer*, 11 D. R. 426 (C. P. Schuyl. 1901).

4. Rule to show cause why service of writ should not be set aside.[18] *O'Neill* v. *Phila. R. T. Co.*, 14 D. R. 502 (Mont. 1905); *Yerkes* v. *Stetson*, 211 Pa. 556 (1904).

5. Rule to show cause why writ of Ejectment should not be abated: *Erskine* v. *Adams*, 9 D. R. 444 (C. P. West.'d., 1901).

6. Rule to show cause why Appeal by Defendant should not be struck off: *Hahn et al* v. *Quaker City Co.*,

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[18] This rule is the only proper remedy where the service of the writ is improper; the preceding rule where the issue of the writ is premature or unwarranted, while an appearance by counsel is a waiver of all irregularities in the service of a writ (*Kemerrer* v. *Markle*, 14 Pa. C. C. 493, (Luzerne, 1894), a defective service is not cured by defendant's entering an appearance *de bene esse; Ehrgood* v. *Orient Ins. Co.*, 11 Pa. C. C. 665 (Lack. 1891).

11 D. R. 138 (C. P. 5, 1901); *Ray* v. *Flemming*, 11 D. R. 648 (Venango, 1901).

7. Rule to show cause why execution and levy should not be set aside: *Hibberd* v. *Terry*, 14 D. R. 594 (Del. 1905); *Williams* v. *Steenwood*, 11 D. R. 22 (Bradford, 1901).

8. Rule to show cause why amended return of sheriff should not be set aside. *Whitman* v. *Higby*, 10 D. R. 39 (Crawford, 1900).

9. Rule to show cause why service of *capias* should not be set aside: *King* v. *Embery*, 3 W. N. C. 97 (C. P. 3, 1878).[19]

10. Rule to show cause why defendant in a *capias* should not be discharged on common bail.[20]

11. Rule to show cause why *capias* should not be amended.[21]

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[19] Where the wrong person has been taken; *Lioansky* v. *Gerzog*, 2 D. R. 220 (C. P. 4, 1892).

Or if a married woman be taken on *capias* this is the proper rule; *Hurst* v. *Smith*, 9 W. N. C. 461 (C. P. 1, 1880).

[20] Formerly the rule to show cause of action and to discharge defendant on common bail or to dissolve attachment was of greater frequency than it is to day, but since the abolition of *capias* for debt and the adoption of Rule X, sec. 1 of the present Rules of Courts of Common Pleas of Philadelphia, requiring an affidavit of cause of action to be filed before issuing the *capias* in libel, slander, etc., it is comparatively little used except in foreign attachment.

[21] Improper if object is to add a new defendant; *Brittin* v. *Schloss*, 9 W. N. C. 510 (C. P. 1, 1880).

12. Rule to show cause why *capias* should not be abated: *McQuigan* v. *McCarthy,* 6 W. N. C. 253 (C. P. 2, 1878).

13. Rule to show cause of action and why defendant should not be discharged on common bail: *Phila. Coal Co.* v. *Huntzinger,* 6 W. N. C. 300 (C. P. 4, 1878); *Boyle* v. *Grady,* 1 W. N. C. 313 (C. P. 2, 1875).

14. Rule to show cause why attachment should not be dissolved.

15. Rule to show cause why an appeal should not be vacated: *Dwire* v. *Weber,* 1 W. N. C. 64 (C. P. Phila. 1874).

16. Rule to show cause why service of the writ should not be set aside:[22] *Lehigh C. & N. Co.* v. *Lehigh Boom Co.,* 6 W. N. C. 222 (C. P. 4, 1878); *City* v.

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[22] There is a difference not always observed as it should be in accurate practice between a rule to set aside the service and a rule to set aside, or, more properly, strike off the *return of* service. The latter is the correct form only when the return is incomplete, or inappropriate to the command of the writ, or in some way fails to meet the requirements of the law, as, *e. g.,* where it shows service on the agent of a non-resident without showing that the latter was engaged in business, but was not personally present in the county at the time. *Gilbough* v. *Keller,* 3 W. N. C. 78 (C. P. 4, 1876). On the other hand, the return may be perfectly good, and yet the service set aside, as *e. g.,* because made while party was in attendance at court, *Torry* v. *Bast,* 3 W. N. C. 63 (C. P. 2, 1876); or because the party was fraudulently decoyed into the jurisdiction for the purpose of being sued. *Hevener* v. *Heist,* 9 Phila. 274 (D. C. 1873). *Sloan* v. *Green,* 7 W. N. C. 408 (C. P. 4, 1878); *Wood* v. *Trust Co.,* 14 W. N. C. 127 (C. P. 3, 1883).

Olive Cemetry Co., Ibid. 238 (C. P. 3, 1878); *Torry* v. *Bast*, 3 W. N. C. 63 (C. P. 2, 1876); *Rex* v. *Piatt*, Ibid. 187 (C. P. 1, 1876); *Samuel* v. *Am. Iron & Steel Co.*, 10 D. R. 43 (C. P. 1, 1901); *Zablocki* v. *D. L. & W. R. R. Co.*, Ibid. 54 (C. P. 3, 1901); *Moyer* v. *Place*, 13 Pa. C. C. 163 (Schuylk., 1892); *Yeakel* v. *Brand*, 9 D. R. 49 (Northampton, 1899); *Ralston* v. *Tobin*, Ibid. 234 (C. P. 2, Allegh., 1900); *Ferree* v. *Pierce*, 10 D. R. 746 (C. P. 2, Allegh., 1901); but see *White* v. *Bank*, 12 Pa. C. C. 254 (C. P. 3, 1893); and *Tyrone Bank* v. *Doty*, Ibid. 287 (Blair, 1892); also *Yerkes* v. *Stetson*, 211 Pa. 556 (1904).

17. Rule to show why *terre-tenant* should not be allowed to intervene:[23] *Rittenhouse* v. *Fetters*, 9 W. N. C. 221: (C. P. 2, 1880).

18. Rule to show cause why appearance by *terre-tenant* should not be struck off.[24]

19. Rule to show cause why sheriffs return to writ should not be struck off. (See preceding Rule 16 and foot note thereto).

20. Rule to show cause why sheriff should not be allowed

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[23] This rule must be invariably allowed and will not operate as a stay unless it be especially so provided. A stay of proceedings may be made part of a rule of course, but even then the stay must be allowed by the court; it is safer practice to ask for a stay in almost all cases. Take for example where a rule is taken to quash a *scire facias*, if the record shows the plaintiff entitled to judgment, even though the rule is pending, judgment can be entered on the writ.

[24] A voluntary appearance by a terre-tenant in a proceeding in a *scire facias sur mortgage* will be struck off; *Holson* v. *Webster*, 9 W. N. C. 206 (C. P. 2, 1880).

to amend his return:[25] *Graham* v. *Furey,* 6 W. N. C. 56 (C. P. 4, 1878); *Lanahan* v. *Collins,* Ibid. 253 (C. P. 1, 1878).

21. Rule to show cause why sheriff should not be allowed to sell goods attached—as perishable or changeable: *Martin* v. *Malseed,* 1 W. N. C. 82 (D. C. 1874).

22. Rule to show cause why actions should not be consolidated: *Stanley* v. *Garrigues,* 1 W. N. C. 28 (D. C. 1874); *Bank* v. *Hunsicker,* 2 W. N. C. 381: (C. P. 1, 1876).

23. Rule to show cause why an appeal from assessment of damages by Viewers in Road case should not be struck off: *Freeze* v. *Columbia Co.,* 6 W. N. C. 145 (Columbia, 1878).

24. Rule to show cause why defendant should not have leave to enter an appeal from award of arbitrators in *forma pauperis: Wendell* v. *Simpson,* 7 W. N. C. 31 (Montgom., 1879).

25. Rule to show cause why writ of *replevin* should not be quashed: *Cortlandt Wagon Co.* v. *Landis,* 9 D. R. 490 (Lanc. 1899).

26. Rule to show cause why *exoneretur* should not be entered, and *fieri facias* be set aside: *Common-*

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[25] It is bad practice for the sheriff to incorporate the service of a copy of the statement of claim in his return to the summons; *Reynolds* v. *Supreme Conclave,* 9 D. R. 622 (C. P. Lanc. 1900). But the return does not seem to be invalidated thereby.

wealth v. *Mccotic et al.*, 12 D. R. 623 (Dauphin, 1903).

27. Rule to show cause why *fieri facias* should not be stayed, and judgment be satisfied: *Bradly* v. *C. & M. R. R. Co.*, 8 D. R. 493 (Clearf. 1899).

28. Rule to show cause why writ of *fieri facias* should not be vacated, or set aside: *Pannebaker* v. *Bitting*, 11 D. R. 537 (Juniata, 1903). In foreign attachment, to show cause why Garnishee should not give bond and sheriff withdraw: *Reis* v. *Junker*, 9 W. N. C. 296 (C. P. 1, 1880).

29. Rule to show cause why action should not be discontinued, when brought by use plaintiff, without consent of legal plaintiff: *Guarantee Co.* v. *Powel*, 29 W. N. C. 571 (C. P. 1, 1892).

II.

Rules relating to bail, security, &c.

30. Rule to show cause why defendant should not be discharged on Common Bail. See *ante*, p. 39. Rule No. 10.)

31. Rule to show cause why bail should not be reduced.

32. Rule to justify security.

33. Rule to show cause why sureties should not justify anew: *McCrossin* v. *Clark*, 1 W. N. C. 301 (C. P. 4, 1875).

34. Rule to show cause why additional security should not be entered or writ (of *Replevin*) quashed: *Rowand* v. *Fox,* 7 W. N. C. 438 (C. P. 2, 1879); *Nittinger* v. *Alexander,* 17 W. N. C. 284 (C. P. 3, 1886).

35. Rule to show cause why surety's obligation should not be for costs only: *Richard* v. *Duryea,* 10 W. N. C. 189 (C. P. 2, 1881).

36. Rule to show why security should not be struck off and order of approval vacated: *Showaker* v. *Kelly,* 2 W. N. C. 95 (C. P. 2, 1875); *Kaufman* v. *Hirsh,* 9 W. N. C. 347 (C. P. 1, 1881).

37. Rule to show cause why sheriff should not assign bond after writ of *replevin* is quashed: *Straus* v. *McCouch,* 10 W. N. C. 274 (S. C. 1881).

38. Rule to justify plea of freehold.

39. Rule to show cause why plea of freehold should not be struck off: *Jenks* v. *Grace,* 1 W. N. C. 20 (D. C. 1874); *Penn Bank* v. *Crawford,* 2 W. N. C. 371 (Allegh., 1875); *Ellis* v. *Cadwalader,* 12 W. N. C. 304 (C. P. 2, 1882). Or as to one defendant only: *Banking Co.* v. *Wolleston,* 1 W. N. C. 27 (D. C. 1874).

40. Rule to show cause why claimant (in *interpleader*) should not be allowed to file his own bond without surety.[26]

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[26] The established form of affidavit in support of this rule is, that the claimant is the sole owner or, at least, that defendant

41. Rule to show cause why one bond in several interpleaders pending at same time should not be accepted: *Richardson* v. *Brunswick*, 10 W. N. C. 81 (C. P. 3, 1881).

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in the execution has no interest, is in possession, and *does not derive his title to the goods from or through the defendant*, or that he derived title through purchase at a judicial sale of the goods. *Becker* v. *Miller*, 1 W. N. C. 83 (D. C. 1874). The best practice is, not only to make the affidavit *in hæc verba*, but also to set out affirmatively, how the claimant does derive title. When the affidavit is in this form, it is usually accepted as sufficient without depositions, and the rule is made absolute as of course. *Bank* v. *Sharp*, 1 W. N. C. 6 (D. C. 1874). Care, however, is not always taken to follow the established form, and language is not unfrequently used which counsel consider equivalent, especially as to the portion *supra* in italics. This is bad practice and sometimes dangerous. The privilege of giving bond without security is matter of grace, and when, as in this case, there is a long-settled and exact form, any departure from it is apt to be looked at with suspicion. Even where the affidavit is in proper form the court will, if any ground of suspicion or collusion is alleged by the plaintiff, order depositions, and unless claimant's title is *prima facie* very clear will refuse the privilege. *Bailey* v. *Vehmeier*, 6 W. N. C. 271 (C. P. 3, 1878); *Landsdorf* v. *Bach*, 1 W. N. C. 147 (D. C. 1875); *Hartman* v. *Schofield*, 1 W. N. C. 154 (D. C. 1874). *Landell* v. *Hager*, 14 W. N. C. 173 (C. P. 1, 1884); *Clymer* v. *Shaw*, 1 D. R. 164 (C. P. 3, 1892).

The bond of a foreign corporation or of a non-resident will not be accepted without security; *Scatchard* v. *Landenberger*, 10 W. N. C. 452 (C. P. 2, 1881; (*Emerson* v. *Grattan*, 4 W. N. C. 574 (C. P. 4, 1878); nor that of a married woman claimant; *Barrett* v. *Gross*, 2 W. N. C. 324; (C. P. 4, 1876); *Ward* v. *Whitney*, 5 W. N. C. 492 (C. P. 1, 1878); nor the husband's when he is defendant in the execution (*Barrett* v. *Gross*, *supra*). But a married woman who is a *feme sole* trader, stands on a different footing. See cases cited under No. 43.

In *City* v. *Hilner*, 9 W. N. C. 541 (C. P. 2, 1881), the City of Philadelphia claimant in interpleader was required to enter bond.

A purchaser from an assignee for benefit of creditors of defendant is *prima facie* entitled to give his own bond; *Smith* v. *Stoddart*, 8 W. N. C. 390 (C. P. 2, 1880). So is a husband when

42. Rule to show cause why claimant in *interpleader*, shall not be permitted to give bond in double amount of judgment, (where the goods are of greater value): *Ellis* v. *Jester*, 7 D. R. 277 (C. P. 4, 1898).

43. Rule to show cause why married woman, claimant in *interpleader*, who is a feme sole trader should not give her own bond: *Seeger* v. *Morhinweg*, 2 W. N. C. 406 (C. P. 2, 1876) *Nice* v. *Hing*, 4 W. N. C. 478 (C. P. 1, 1877) *Hahs* v. *Schmeyer*, 6 W. N. C. 271 (C. P. 3, 1878) or why claimant in *interpleader* should not be allowed to enter security in double the amount of value of goods taken in execution: *Com. to use* v. *Chapman*, 6 W. N. C. 15 (C. P. 1, 1878).

III.

Rules relating to attorneys.

44. Rule on counsel to file his warrant of attorney[27]

45. Rule on counsel to show cause why he should not file a sufficient warrant of Attorney. (*Citizen's Bank* v. *Keim*, 1 W. N. C. 263 (C. P. 1, 1875).

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his goods are levied on as wife's; *Phillips* v. *Quigley*, 9 W. N. C. 511 (C. P. 2, 1881). And also a consignor whose goods are levied on as property of a commission merchant; *Landenberger* v. *Landenberger*, 16 Phila. 11 (C. P. 1, 1883). But not a tenant in common; *Vent* v. *Pashley*, 9 W. N. C. 559 (C. P. 2, 1881).

[27] By the act of April 14, 1834 (P. L. 354), sec. 71; the attorney "shall if required" file his warrant and by the established construction of the act it is a matter of right if applied for in

46. Rule to show cause why paper purporting to be a warrant of Attorney should not be struck from the record. *Hess* v. *Hess*, 1 W. N. C. 194 (C. P. 4, 1875); *Irvine* v. *Dowling*, 9 W. N. C. 366 (C. P. 2, 1880); *Mintzer* v. *Mintzer*, 11 W. N. C. 400 (C. P. 2, 1882); *D. L. & W. R. R.* v. *Rhoades*, 180 Pa. 157 (1897).

47. Rule to set aside service of summons on an attorney: *Young* v. *Armstrong*, 13 W. N. C. 313 (C. P. 2, 1883).

48. Rule to show cause why counsel should not withdraw his appearance. *Wright* v. *Galloway*, 8 W. N. C. 163 (C. P. 3, 1880).

This rule is always at the instance of the attorney himself.

49. Rule to show cause why entry of appearance should not be struck off.[28] *Freiburg* v. *Reliance Co.*, 1 W. N. C. 193 (C. P. 3, 1875).

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time (*Sheetz* v. *White*, 7 W. N. C. 590, C. P. 1, 1879); *Campbell* v. *Galbreath*, 5 Watts. 426; *Mercier* v. *Mercier*, 2 Dall. 142). In *City* v. *Strawbridge*, 4 W. N. C. 215 (C. P. 4, 1877); counsel made a motion for the rule. This was an unnecessary precaution as it is now a rule absolute in the first instance and stays proceedings, *Reese* v. *The Church*, 1 W. N. C. 416 (C. P. 4, 1875); although in *Campbell* v. *Galbreath*, *supra*, it was not so held. The contest in none of the reported cases seems to have been otherwise than on the sufficiency of the warrant. *Citizens' Bank* v. *Keim*, *supra*; *Hess* v. *Hess*, Ibid. 194 (C. P. 4, 1875). *Miss. R. R. Co.* v. *Southern R. R. Asso.*, 8 Phila. 107 (D. C. 1871) *Sterner* v. *Beeker*, 15 W. N. C. 519 (C. P. 3, 1885). In Divorce, Rule 16, sec. 9, Rules of Courts C. P. Phila. p. 73, appearance by counsel for respondent must be made by filing a duly acknowledged Letter of Attorney.

[28] Notice of this rule must be duly served not only on the client, but also on the opposite party or his counsel, who has an

50. Rule on attorney to show cause why he should not be stricken from the roll: *In re Ingersoll,* 1 W. N. C. 18 (D. C. 1875); *In re Derringer,* 4 W. N. C. 200 (C. P. 1, 1877).

51. Rule to show cause why order admitting an attorney to practice should not be vacated: *In re O'Grady,* 4 W. N. C. 199 (C. P. 1, 1877).

52. Rule on an attorney to show cause why he should not produce papers: *Com.* v. *Moyer,* 11 W. N. C. 34 (Q. S. 1881).

IV.

Rules relating to the pleadings.

53. Rule to show cause why suit should not be marked to the use of plaintiff's assignee in bankruptcy: *Cottrell* v. *Mann,* 1 W. N. C. 157 (D. C. 1875).

54. Rule to show cause why assignee in bankruptcy should not be admitted to prosecute in his own name: *Silk Co.* v. *Disston,* 7 W. N. C. 63 (C. P. 2, 1879).

55. Rule by terre-tenant (or other privy) to show cause why he should not be admitted *pro inter esse suo* and defend.[29]

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interest that the status of the suit should not be changed to his possible detriment without his being heard in the matter.

This rule is proper where a party disputes the right of an attorney to appear for him or has discharged his counsel and employed another.

[29] A voluntary or unauthorized appearance by terre-tenant or other will be on proper application be struck off; *Hobson* v. *Webster,* 9 W. N. C. 206 (C. P. 2, 1880).

56. Rule to declare (or plead) within the times regulated by Act of Assembly or Rule of Court.[30]

57. Rule to show cause why Plaintiff should not be allowed to withdraw a rule to plead: *Richards* v. *Johnson*, 14 W. N. C. 273 (C. P. 1, 1884).

58. Rule to show cause why the time within which depositions are ordered to be filed should not be enlarged.

59. Rule to show cause why rule to plead, etc., should not be struck off.[31] *Stoeckle* v. *Stoeckle*, 2 W.

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[30] A rule to plead cannot be obtained pending the determination of one for a Bill of Particulars; *Pfaelzer* v. *Pullman*, 2 W. N. C. 324 (C. P. 4, 1876).

Formerly rules to extend the time to file pleas, etc., were very common, but since the act of May 21, 1887 (P. L. 271), they are not so frequently seen on the lists. That act fixed the time when the affidavit of defence must be filed and it is beyond the power of the court to enlarge it. The only remedy is to apply to open the judgment if one is entered in default. It is dangerous to give one's reason for failure to file an affidavit of defence in an affidavit for judgment, for want of sufficiency, will surely be given and in the case of a plea it is wholly impossible to do so, but it is difficult to imagine circumstances which would render it infeasible to plead.

[31] *Barclay* v. *Barclay*, 2 W. N. C. 478 (C. P. 2, 1876), was a suit in assumpsit to recover rent; a narr in the common courts was filed on May 13, 1870, on March 1, 1876, a second *narr*, declaring for use and occupation was filed; a rule to strike off the second *narr* was made absolute, for the reason that defendant was in peril of two judgments against him and certain of one, as the issue raised in either would prevent successful defence of one or the other. The act of May 21, 1887, obviates such a condition.

The rule to strike off is pertinent where the plea is filed too late, or not accompanied by a required affidavit; *Holzer* v. *Byrne*,

N. C. 534 (C. P. 1, 1876); *Earley* v. *Albertson,* Ibid. 541 (C. P. 4, 1876); *Moyer* v. *Loeb,* 3 W. N. C. 95 (C. P. 2, 1876); *Kern* v. *Bockius,* 6 W. N. C. 135 (C. P. 3, 1878); *Watts* v. *Ward,* Ibid. 206 (C. P. 2, 1878).

60. Rule to show cause why plea should not be withdrawn: *Adams* v. *Kehoe,* 1 W. N. C. 232 (C. P. 2, 1875).

61. Rule to show cause why defendant should not be permitted to file an additional plea: *Weiler* v. *Lockheim,* 6 W. N. C. 191 (C. P. 1, 1878).[32]

62. Rule to show cause why statement of claim should not be amended.[33]

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10 W. N. C. 101 (C. P. 2, 1881). *Gallagher* v. *Thornley,* 10 W. N. C. 189 (C. P. 2, 1881).

As to pleas in bar the court will only strike off when manifestly against the rules of pleading, *e. g.,* special pleas which amount to the general issue, or in violation of the act of May 21, 1881, or if it be frivolous or inappropriate to the action; *Holtz* v. *Thompson,* 12 W. N. C. 386 (C. P. 2, 1882). Unless such reason clearly appears the rule will be disregarded and plaintiff put to his demurrer; *Beckford* v. *Ice Co.,* 7 W. N. C. 16 (C. P. 2, 1879).

If on demurrer the court thinks defendant has been intentionally trifling or delaying the case, it will give final judgment against him.

[32] This rule is unusual, for although in theory, the leave of court must be had when defendant desires to file more than one plea, the ordinary practice is to assume the leave and put the plaintiff to his rule to strike off.

[33] This rule is unnecessary until affidavit of defence or plea is filed, it is a matter of right for plaintiff to amend his statement conferred by the spirit if not the letter of the act of 1806.

63. Rule to show cause why defendant should not have leave to file a supplemental affidavit of defence.

64. Rule to show cause why the record shall not be amended by correcting errors in names of parties.[34]

65. Rule on plaintiff to furnish bill of particulars,[35] *Furbush* v. *Phillips*, 2 W. N. C. 198 (C. P. 2, 1875); *Borda* v. *R. R. Co.*, 3 W. N. C. 351 (C. P. 4, 1877); *Carr* v. *Heacock*, 12 W. N. C. 305 (C. P. 4, 1882).

66. Rule to show cause why plaintiff should not furnish a more specific bill of particulars: *Hunter* v.

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[34] The power of the court to grant such a rule is given by the Act of April 16, 1848, P. L. 353, and may be exercised where it is sought to strike out an initial in defendant's name and adding another name but proof of service of the rule on such party must be made at the return of the rule; *M'Glinn* v. *Johnson*, 1 W. N. C. 312 (C. P. 1, 1875). Also where an unincorporated society is plaintiff the amendment asked is to add the names of the individual members of the association: *Sheba Lodge* v. *Berry* 17 W. N. C. 223: (C. P. 1, 1885). Same in case of defendant; *Hirsch* v. *Kohn*, 10 W. N. C. 237 (C. P. 2, 1881).

[35] The call for a bill of particulars is strictly no part of the record, but matter *in pais*, however, to avoid disagreements between counsel on the subject, the better practice is to enter a rule formally: ordinarily the rule is of course absolute in the first instance. This rule operates as a stay of proceeding; *Pfaelzer* v. *Carko*, 2 W. N. C. 324 (C. P. 4, 1876). Prior to the Act of May, 25, 1878, P. L. 156, the rule was *nisi* in divorce but that act gives the respondent the right to the rule.

The fact that the statement of claim has been sustained in demurrer does not deprive defendant of right to bill of particulars; *Fishborn* v. *N. Y. C. R. R.* (13 D. R. 608, C. C. U. S. E. D. Pa. 1904.) The court in its discretion may of its own motion direct a bill of particulars; *Caruthers* v. *Pierie*, 13 D. R. 780 (C. P. 3, 1904).

Burnham, 1 W. N. C. 74 (D. C. 1874); *Titus* v. *Baird*, Ibid. 81 (D. C. 1874); *Patterson* v. *Jones*, Ibid. 153 (D. C. 1874); *Livingston* v. *Enochs*, 2 W. N. C. 244 (C. P. 2, 1875); *Nichols* v. *Edwards*, 8 W. N. C. 470 (C. P. 1, 1880); *Ins. Co.* v. *Bank*, 12 W. N. C. 251 (C. P. 2, 1882).

67. Rule to show cause why defendant should not furnish a bill of particulars under the plea.[36] *Reed* v. *Church*, 7 W. N. C. 79 (C. P. 2, 1879).

68. Rule to show cause why bill of particulars should not be amended.

69. Rule to show cause why *nonsuit* should not be entered for failure to furnish bill of particulars or more specific bill of particulars.

70. Rule to show cause why plaintiff should not file a more specific statement of claim. *Diehl* v. *Bockius*, 1 D. R. 479 (C. P. 1, 1892); *Dow* v. *Williams*, 4 D. R. 659 (C. P. 1, 1895); *Doriott* v. *Hageman*, 21 W. N. C. 556 (C. P. 2, 1888).[37]

71. Rule to show cause why plaintiff should not be ordered to proceed in foreign attachment. (*E. g.*, by issuing *scire facias* against garnishees): *Finch*

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[36] Since the Act of May 21, 1887, P. L. 271, this rule is of doubtful use, for in cases in *assumpsit* a rule for judgment for want of a sufficient affidavit of defence would accomplish the same result and in trespass it is not available, because by section 7 of this act special pleading is abolished and its use formerly was restricted to these.

[37] This rule does not require an *allocatur*, but must be to show cause; *Leekurs* v. *Rea*, 29 W. N. C. 65 (C. P. 2, 1891).

v. *Bullock*, 1 W. N. C. 263 (C. P. 1, 1875); *Boyd* v. *Davis*, 1 D. R. 438 (C. P. 4, 1892).

72. Rule on garnishee to answer interrogatories.

73. Rule on garnishee to show cause why he should not file a more specific answer.[38]

74. Rule (on behalf of garnishee) why interrogatories and rule should not be struck off: *Klett* v. *Craig*, 1 W. N. C. 129, (S. C. 1874); *Yerkes* v. *Simons*, Ibid 473 (C. P. 4, 1875).

75. Rule (on behalf of garnishee)to show cause why rule to answer interrogatories should not be discharged: *Phila. Textile Co.* v. *Strause*, 9 D. R. 44 (C. P. 4, 1899).

76. Rule (on behalf of garnishee) to show cause why garnishee's counsel fee should not be paid: *Wanamaker* v. *Fitzpatrick*, 10 D. R. 291 (C. P. 1, 1901).

77. Rule to show cause why garnishee should not pay into court enough to cover attachment and pay the rest to creditor: *Morehouse* v. *Ins. Co.*, 16 W. N. C. 34 (C. P. 2, 1885).

78. Rule (by sheriff) to show cause why *interpleader*

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[38] This and the preceding rule should contain the alternative penalty for non-compliance within the usual time when, upon proof of service of the rule, upon failure to comply judgment may be entered on motion in the prothonotary's office: *Fisher* v. *Blenn*, 2 W. N. C. 172, (C. P. 4, 1875).

should not be ordered.[39] *Waterman* v. *Langdon,* 15 Phila. 211.

79. Rule for issue on sheriff's *interpleader* under Act of May 26, 1897, P. L. 95.[40]

80. Rule to show cause why defendant should not have leave to pay money into Court and the claimants thereto be compelled to interplead.[41] *Vandegrift* v. *Freeman,* 1 W. N. C. 109 (D. C. 1874); *Loughlin* v. *McCormick,* 2 W. N. C. 352 (C. P. 2, 1876); *Wasseman* v. *Bank,* 3 W. N. C. 475 (C. P. 4, 1877).

81. Rule to show cause why declaration, bond, etc., in *interpleader* should not be struck off. *Hallowell* v. *Schnitzer,* 6 W. N. C. 469 (C. P. 2, 1879).

82. Rule to show cause why copies should not be substituted for lost papers of record.[42] *Kline* v. *Schaffer,* 1 W. N. C. 63 (D. C. 1874).

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[39] This rule being in relief of the sheriff under the Act of April 16, 1848, P. L. 441, is favored by the courts and by long established custom is made absolute on its return. It is granted only at the instance of defendant; *Swift Co.* v. *Fleming, et al.,* 12 D. R. 287 (Clearf. 1902). The claimant must file a formal statement; *Provost* v. *Algeo,* 8 D. R. 517. (C. P. 1 Allegh. 1899).

[40] This act has no application in the case of domestic attachment; *M'Cullough* v. *Linn,* 8 D. R. 378: (Cumberland 1899). If no answer is made to the rule it will be made absolute by the court; *Meyer* v. *Jeske,* 8 D. R. 239 (Pike, 1898).

[41] This is the correct rule for a garnishee to take, who has been served with several attachments: *Wilbraham* v. *Horrocks,* 8 W. N. C. 285 (C. P. 4, 1880).

[42] As to duplicate of lost writ, see *Hope Association* v. *Dunham,* 5 W. N. C. 148 (C. P. 2, 1878).

83. Rule to show cause why impertinent matter in the pleadings of record should not be struck out. *A. C. v. B. C.*, 1 W. N. C. 372 (C. P. 1, 1875); *Moelling* v. *Nat. Co.*, 4 W. N. C. 72 (C. P. 3, 1877).

84. Rule to show cause why exceptions to auditor's report should not be struck off. *Croft's Est.* 14 W. N. C. 437 (C. P. 2, 1884).

V.

Rules relating to evidence.

85. Rule to produce books and papers at trial.[43] *Sollers* v. *Dunbar*, 1 W. N. C. 313 (C. P. 2, 1875); *Bank* v. *Power*, 2 W. N. C. 275 (C. P. 4, 1876); *Preston* v. *Sarmiento*, 4 W. N. C. 89 (C. P. 2,

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[43] Under act of Feb. 27, 1798, 3 Sm. L. 303, by long settled practice this is a thirty day rule; the rule is not necessarily an *allocatur* but the reason for the rule should specifically state the interest of the party asking it, the information desired and the object to be attained. *Thomas* v. *Lansdale & Norristown E. R. R. Co.*, 13 D. R. 803 (Montgom. 1894). This rule is proper where a paper which plaintiff requires to prepare his statement of claim is in possession of defendant to procure a copy (*Pioso* v. *Equitable L. A.*, 12 D. R. 51 C. P. Lanc. 1903). But it cannot be enforced in an action for libel (*Rogers* v. *Dun*, 8 D. R. 616, 1899). Nor against an assignee for benefit of creditors (*Hazlett's Est.*, S. D. R. 201, 1899). Nor can the commonwealth employ it to compel defendant in an indictment for libel to produce the paper which is the subject of the indictment (*Com.* v. *Meades*, 11 D. R. 10 Q. S. York, 1901). Production of books, etc., may be compelled by Bill of Discovery (*Reed* v. *Stevenson*, 6 W. N. C. 173, C. P. 4, 1878). But not in an action on penalty (*Boyle* v. *Smithman*, 146 Pa. 255); *Ladenburg* v. *P. R. R. Co.*, 6 D. R. 453 (C. P. 4, 1897).

1877); *Moelling* v. *Lehigh Co.*, 9 Phila. 223 (D. C. 1874).

86. Rule to take depositions.[44]

87. Rule to show cause why an order should not be made directing the attendance of opposite party as witness. *Girard Ins. Co.* v. *Mut. Ins. Co.*, 10 W. N. C. 136 (C. P. 3, 1881).

88. Rule to show cause why opposite party should not be examined under deposition. *Bank* v. *Bryan*, 15 W. N. C. 468 (C. P. 1, 1884).

89. Rule to show cause why party should not file names of witnesses to be examined under a commission. *Cot. Co.* v. *Sternberger*, 12 W. N. C. 290 (C. P. 1, 1882).

90. Rule to show cause why time for taking testimony. (as *e. g.*, under a commission, should not be ex-

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[44] Under rule 15, sec. 1 (Rules of Courts of Common Pleas, Philadelphia County), depositions taken under rule may be read at trial of the cause in case of the death, absence from state or "other legal inability of witness to attend."—But the deposition of a witness who has a residence in the state and within forty miles of the place of trial unless the court is satisfied that the witness cannot be produced at the trial. Production of papers, etc., will not be required at the taking of depositions, although they will be at the trial *Raub* v. *Van Horn*, 133 Pa. 573; *Penna. Co., etc.* v. *G. & N. R. R. Co.*, 20 Phila. 332 (C. P. 4, 1891). This rule is absolute and of course under the rules and regulations established by the courts, but when it is desired to vary from these an *allocatur* must be obtained *M'Guigan* v. *Swayne*, 1 W. N. C. 41 (D. C. 1874).

tended.) *Lowenstein* v. *Birnbaum*, 6 W. N. C. 452 (C. P. 4, 1879).

91. Rule to show cause why deposition of a party should not be taken as if in cross examination. *Asch.* v. *W. P. R. R. Co.*, 4 W. N. C. 571 (C. P. 2, 1877); AMEND. TO RULE OF COURT, XV., SEC. 48, 5 W. N. C. 14 (C. P. Phila. 1878).

92. Rule to show cause why depositions should not be filed. *Vanarsdalen* v. *Dickerson*, 2 W. N. C. 111 (C. P. 1, 1875); *Johnson* v. *P. R. R.*, 5 W. N. C. 360 (C. P. 1, 1878); *O'Connor* v. *Weeks*, 10 W. N. C. 372 (C. P. 4, 1881); *Rogers* v. *Gilmore*, 13 W. N C. 193 (C. P. 2, 1883).

93. Rule to show cause why auditor should not file testimony. *Miller* v. *Trimble*, 1 W. N. C. 390 (C. P. 3, 1875); *McMullin's Est.*, Ibid. 432 (C. P. 3, 1875).

94. Rule to show cause why written instrument, the cause of action, should not be transmitted with commission for inspection by witness. *Kohn* v. *Teller*, 2 W. N. C. 487 (C. P. 2, 1875).

95. Rule to show cause why Letters Rogatory should not issue.[45] *Wilkinson* v. *Starr*, 16 W. N. C. 35 (C. P. 2, 1885).

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[45] Under rule of court 15, sec. 8 (Rule Courts Common Pleas, Philadelphia Co., p. 69), written interrogatories must be annexed, the court will not lend aid to the execution of letters regatory by a *viva voce* examination *Doubt* v. *P. & L. E. R. R. C.*, 6 D. R. 238 (C. P. 1, Allegh. 1897).

VI.

Rules relating to trial.

96. Rule to show cause why a new trial should not be granted.[46]

97. Rule to show cause why nonsuit should not be taken off. *Riggin* v. *Beckie,* 9 D. R. 439 (C. P. 4, 1900).

VII.

Rules relating to verdict and assessment of damages.

98. Rule to show cause why the verdict should not be amended. *Paul* v. *Caughlin,* 1 W. N. C. 390 (C. P. 4, 1875); *Carl* v. *Stine,* 14 D. R. 534 (C. P. Columbia, 1905).

99. Rule to show cause why verdict should not be set aside. *McCauley* v. *McCauley,* 4 W. N. C. 402 (C. P. 4, 1877), or struck off. *Elliot* v. *Mullen,* 1 W. N. C. 314 (C. P. 4, 1875).

100. Rule on plaintiff to elect to remit a portion of the verdict [naming amount] or have a rule for new

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[46] By rule 27 (Rules of Courts of Common Pleas of Philadelphia County, p. 123), this rule must be taken within four days after the verdict: this time as computed excludes the day of the trial; and the bill of exceptions to the rulings of the court during the trial must be presented to the court for signing within ten days after the verdict *Gastman* v. *U. T. Co.,* 13 D. R. 210 (C. P. 1, 1904).

trial made absolute. *Keating* v. *R. R. Co.*, 5 W. N. C. 232 (C. P. 2, 1878).

101. Rule to show cause why the assessment of damages made by the Prothonotary on a judgment should not be vacated.[47] *Siner* v. *Henderson*, 1 W. N. C. 94 (D. C. 1874); *Terry* v. *Slemmer*, 11 W. N. C. 155 (C. P. 2, 1881); *Bldg. Asso.* v. *Schuller*, 3 W. N. C. 431 (C. P. 1, 1877); *Bldg. Asso.* v. *Lentz*, 10 D. R. 257 (C. P. 5, 1901).

102. Rule to show cause why assessment of damages sur judgment should not be amended.[48] *Samuel* v.

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[47] Sometimes this rule is directed to the prothonotary as well as to the plaintiff but this does not seem to be necessary, as the prothonotary's position will be supported by the plaintiff. But the amount of the assessment as it stands, and as it is claimed should be, are properly incorporated in the rule. This rule does not require *allocatur*, but it is more orderly practice to ask one, as the affidavit in support of the petition for the rule, will display the facts of the petitioner's case in a far more satisfactory way than by the brief "reason for rule" can supply.

[48] These rules are more frequently employed in cases of judgments entered by warrant of attorney attached to or incorporated in a bond or promissory note which contain a clause stipulating that a sum measured *in per centum* of the real debt shall be incorporated in the assessment of damages when judgment is entered by virtue of the warrant of attorney. It is improper to so assess unless active steps are taken by the attorney for plaintiff. He must do more than merely enter judgment: to issue a *fieri facias* is sufficient to entitle him to his commission. There is a diversity of opinion as to how the "attorney's commission" is to be computed whether upon the principal sum of the debt or upon this sum plus interest: the preponderance of practice favors the former, but notwithstanding the authority of *Bldg. Asso.* v. *McKeown*, 16 W. N. C. 456 (C. P. 2, 1885), occasionally the latter method is adopted. The following cases are given as indicatory, the attitude of the courts as respects amount of the "commission"; *Sloan* v. *Garren*, 13 Phila. 63; *Hennig* v. *Bied-*

Scott, 7 W. N. C. 438 (C. P. 2, 1879), or reduced. *Reed* v. *Worthington,* 9 W. N. C. 192 (C. P. 4, 1880).

103. Rule to show cause why assessment of damages by jury of inquest should not be set aside.[49] *Muller* v. *Moore,* 2 W. N. C. 429 (C. P. 4, 1876); *Bender* v. *Gibbon,* 4 W. N. C. 543 (C. P. 4, 1877); *Reilly* v. *I. C. B. Union,* 12 W. N. C. 93 (C. P. 1, 1882).

104. Rule to show cause why an award should not be set aside. *Navel* v. *Elliot,* 5 W. N. C. 35 (Tioga, 1878).

VIII.

Rules relating to judgment.

105. Rule on plaintiff to show cause why he should not produce originals of instrument sued on, for inspection.[50] *Richardson* v. *Snyder,* 6 W. N. C. 414 (S. C. 1879).

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erwolf, Ibid 65; *Reed* v. *Warthryton,* 9 W. N. C. 192 (C. P. 4, 1880). *Imler* v. *Imler,* Ibid 196 (S. C. 1880). Since the act of July 9th, 1901, P. L. 614, the courts have been more liberal in allowing the attorney's commission to stand as provided by the instrument.

[49] This rule is of very infrequent occurrence and is not favored by the courts. It does not rest at all on the same principles as a motion for a new trial for insufficient or excessive damages, but rather on the analogy of an award, which is not to be set aside except for fraud or misconduct or plain mistake of law.

[50] To enable defendant to take advantage of an affidavit of defence if a variance: it is not a rule of course but requires allocatur (*Burton* v. *McCully,* 9 W. N. C. 206 C. P. 2, 1880). Indispensable that the copy should be accurate; *Guskey* v. *Sparter,* 1 W. N. C. 470 (C. P. 2, 1875).

106. Rule for judgment for want of a sufficient affidavit of defence.[51]

107. Rule to show cause why judgment should not be entered for amount admitted in affidavit of defence to be due (under Act of May 31, 1893, P. L. 185).[52] *Calkins* v. *Keely*, 3 D. R. 339 (C. P. 2, 1894).

108. Rule to show cause why part of plaintiff's cause of action should not be withdrawn—*e. g.*, an item in a book account—and judgment entered on the portion admitted. *Johnson* v. *Bazin*, 4 W. N. C. 171 (C. P. 4, 1877).

109. Rule to show cause why judgment should not be entered on a conditional verdict. *Williams* v. *Eagin*, 1 W. N. C. 346 (C. P. 4, 1875).

110. Rule to show cause why judgment should not be entered by virtue of warrant of attorney more than twenty years old. (Under Rule of Court 23,

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[51] This rule must be discharged unless proof of service of a copy of the statement on the defendant or his attorney is filed of record with the motion for the rule showing service was made full fifteen days previous to motion, and the record shows the statement was filed within that time; *Phila. Cloak Co.* v. *Williamson*, 9 D. R. 40 (Schylk 1900). On this rule judgment cannot be entered for amount admitted to be due; *Locher* v. *Lensing*, Ibid 704 (Lanc. 1900). This rule must be taken before any further steps are taken in the case; *O'Neil* v. *Rump*, 22 Pa. 395 (1853).

[52] Judgment may be entered on motion filed in the Prothonotary's office if the amount admitted to be due is clearly apparent. *Roberts* v. *Sharp*, 161 Pa. 185 (1894). But see *Lewis* v. *Bonnert*, 12 Pa. C. C. 366 (Lack. 1892).

Sec. 5). *Henry* v. *Fawrest,* 10 W. N. C. 571 (C. P. 2, 1881).

111. Rule to show cause why judgment should not be entered on the whole record. *City to Use* v. *Wistar,* 6 W. N. C. 136 (C. P. 4, 1878),

112. Rule to show cause why nonsuit should not be entered. *Fouse* v. *Carrick,* 5 W. N. C. 168 (C. P. 1, 1878).

113. Rule to show cause why compulsory nonsuit should not be taken off. *Watson* v. *Hue,* 9 D. R. 579 (Warren, 1899); *Linderman* v. *Land Co.,* 15 W. N. C. 192 (C. P. 4, 1884); *Kitchen* v. *Ins. Co.,* Ibid. 548 (C. P. 1, 1885).

114. Rule to show cause why *non-pros* should not be struck off. *Paris* v. *Hein,* 6 W. N. C. 124 (C. P. 4, 1878); *Seidel* v. *Brecker,* Ibid. 135 (C. P. 4, 1878); *Ellis* v. *Donaghy,* Ibid. 541 (C. P. 3, 1879).

115. Rule to show cause why judgment entered for want of an affidavit of defence should not be struck off. *Miller* v. *Ins. Co.,* 1 Pearson, 106 (Dauph. 1857). Or rule to show cause why rule for judgment for want of a sufficient affidavit of defence (which had been discharged) should not be re-instated and made absolute. *Levinson* v. *Blumenthal,* 14 D. R. 628 (Luzerne, 1905).

116. Rule to show cause why judgment should not be entered *de bonis testoris. Harper* v. *Valentine,* 4 W. N. C. 38 (C. P. 4, 1877).

117. Rule to show cause why judgment should not be en-

tered against garnishee for amount admitted in answer to be due defendant. *Ferguson* v. *Craig*, 1 W. N. C. 153 (D. C. 1874).

118. Rule to show cause why judgment should not be entered against garnishee for not making more specific answer.[53]

119. Rule to show cause why an appeal from a magistrate should not be dismissed for want of jurisdiction.[54] *Quigley* v. *Quigley*, 10 W. N. C. 388 (Chester, 1879).

120. Rule to show cause why judgment entered for want of a plea on same day plea is filed should not be struck off.

121. Rule to show cause why judgment should not be entered in the appearance docket *nunc pro tunc*. *Phila.* v. *Gault*, 8 W. N. C. 14 (C. P. 4, 1879).

122. Rule to show cause why an assigned judgment against the petitioner, should not be set off against one in his favor.[55] *Horton* v. *Miller*, 44 Pa. 256 (1863); *Windle* v. *Moore*, 10 W. N. C. 387

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[53] For failure to answer at all judgment may be taken in Philadelphia by motion in prothonotary's office, and also if garnishee fails to obey a rule for more specific answer, if, however, he does file an answer following such a rule then this one must be taken to determine the sufficiency of the answers; *Fisher* v. *Blenn*, 2 W. N. C. 172 (C. P. 4, 1875).

[54] The better practice would seem to be to demur to the statement filed in the Common Pleas, by which the question of jurisdiction would be reached as readily as by the rule.

[55] A judgment cannot be set off against one which has been opened; *Barles* v. *Wright*, 28 Pa. Super. Ct. 160 (1905).

(Chester, 1880); *Stout* v. *Moore,* 7 W. N. C. 456 (C. P. 4, 1879).

123. Rule to show cause why a mistake in entering judgment should not be corrected, as to name of defendant. *Schwartz* v. *Maurer,* 2 W. N. C. 445 (C. P. 2, 1876).
As to amount. *Gourley* v. *Hess,* 8 W. N. C. 140 C. P. 3, 1879).
—As to superfluous matter. *Hartley* v. *White,* 94 Pa. 31 (1880).

124. Rule to show cause why judgment should not be struck off.[56] *Punxsutawney B. & L. A.* v. *Gallo,* 9 D. R. 761 (Jefferson, 1900); *Wilkinson* v. *Nichols,* 10 W. N. C. 350 (C. P. 3, 1887).

125. Rule to show cause why judgment on a transcript from a magistrate's court should not be struck off and case dismissed.[57] *Wilson* v. *Keely,* 6 W. N. C. 272 (C. P. 4, 1878).

126. Rule to show cause why judgment should not be

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[56] The better term is "vacated" rather than "struck off," occasionally the rule is to "set aside" the judgment, but it is doubted whether this will be as effective to raise the lien of the judgment as to vacate. This rule is only proper where an irregularity on the face of the record is apparent. *Rothenhausler* v. *Rothenhausler,* 6 W. N. C. 560 (C. P. 2, 1879). *Laches* on the part of defendant is fatal to the rule (*Fry* v. *Morgan,* 9 D. R. 210 (Schuylkill 1900); *Blake* v. *P. R. R. Co.,* 12 D. R. 661 (Blair 1903).

[57] The Court of Common Pleas has no power to vacate or annul a judgment in a transcript from the docket of a justice of the peace or magistrate unless the record displays such an irregularity as will render the judgment void. *Hicks* v. *Bldg. Asso.,* 12 D. R. 143 (Berks 1902).

opened and defendant permitted to make defence.[58] *Hipple* v. *Stoner*, 14 D. R. 631 (Lancaster, 1905).

127. Rule to show cause why judgment should not be modified, (as *e. g.*, by directing that no execution issue without order of court). *Whipple* v. *Fire Association*, 3 W. N. C. 259 (C. P. 3, 1876); or by limiting the estate recovered, in ejectment to a portion instead of the whole. *Gourley* v. *Hess*, 8 W. N. C. 140 (C. P. 3, 1879).

128. Rule to show cause why judgment against several defendants should not be marked to the use of

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[58] If the petitioner is a stranger to the record—terre-tenant or person affected by the judgment—the rule should be "and petioner admitted to *inervene pro inter esse suo* and made defense" *Rittenhouse* v. *Fetters*, 9 W. N. C. 221 (C. P. 2, 1880). If plaintiff responds to petition and makes answer raising a conflict with the averments of petition, the court must determine the facts of the case upon depositions *Hotchkiss* v. *Lamphier*, 9 D. R. 23 (Crawford 1899). See as to evidence required; *Cooke* v. *Edwards*, 9 D. R. 182 (C. P. 1900). As to judgment entered by warrant of attorney; *Miller* v. *Schenk*, 94 Pa. 37 (1880). The rule will be discharged unless the averments in the petition, if denied by plaintiff, are unsupported by depositions; *Appelgate* v. *Cohn*, 1 Pa. Super. Ct. 174 (1896). When defendant alleges a defense to a claim upon which judgment has been entered for failure to file an affidavit of defense in time, upon a rule thereto directed and served the court will pass upon the sufficiency of the defense in determining the rule *Hunter* v. *Forsyth*, 205 Pa. 466 (1903).

Act of June 3, 1887 P. L. 332, conferred no power on married woman to confess judgment to secure debt of husband; *Real Est. Ins. Co.* v. *Roop*, 132 Pa. 496 (1890); *Pinkney* v. *Murray*, 15 W. N. C. 391 (S. C. 1880). But see, as to a D. S. B. executed prior to this act upon which judgment has been entered subsequent to act June 8, 1893 P. L. 344; *Mutual Life Ins. Co.* v. *Heydrick*, 22 Pa. C. C. 159 (Crawf. 1899).

one of them. *Pearce* v. *Yost,* 1 W. N. C. 472 (C. P. 2, 1875).

129. Rule to show cause why the marking to use of a judgment should not be vacated.

130. Rule to show cause why plaintiff should not issue execution against all the defendants equally, or upon payment by one, mark the judgment to his use. *Wilson* v. *Ritchie,* 4 W. N. C. 37 (C. P. 2, 1877).

131. Rule to show cause why the prothonotary should not enter satisfaction of the judgment of record.[59]

132. Rule to show cause why plaintiff should not enter satisfaction, under act March 14, 1876, P. L. 7. *Horton* v. *Hopf,* 4 W. N. C. 381 (C. P. 2, 1877); *Felt* v. *Cook,* 9 W. N. C. 246 (S. C. 1880); *City* v. *Owens,* 12 W. N. C. 292 (C. P. 3, 1882).

133. Rule to show cause why verdict in interpleader should not be erased from judgment index. *Keyser* v. *Ellis,* 13 W. N. C. 313 (C. P. 1, 1883).

134. Rule to show cause why satisfaction of a judgment should not be revoked. *Mooney* v. *Carlin,* 1 W. N. C. 92 (D. C. 1874); *Crouthamel* v. *Silberman,* Ibid. 131 (D. C. 1874); *Schnitzler* v. *Hammill,* Ibid. 471 (C. P. 2, 1875).

135. Rule to show cause why an award of arbitrators

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[59] If discharge is claimed the rule should be to open the judgment.

should not be vacated and petitioner let into a defence. *Lon et al.* v. *Nolan et al.*, 8 D. R. 531 (C. P. 2, Allgh., 1899).

IX.

Rules relating to costs.

136. Rule to show cause why security should not be entered for costs.[60] *Roese* v. *Barry*, 1 W. N. C. 20 (D. C. 1874); *Sheridan* v. *Cassidy*, Ibid. 134 (D. C. 1874); *Rathbone* v. *Stetson*, 4 W. N. C. 55 (C. P. 1, 1877); *Applegate* v. *R. R. Co.*, 12 W. N. C. 406 (C. P. 1, 1882); *Hubble White Co.* v. *White Co.*, 9 D. R. 568 (C. P. Blair, 1900) and *Bement* v. *Jackson*, Ibid. 706 (Cumberland, 1900). In interpleader: *Smith* v. *Stoddart*, 8 W. N. C. 407 (C. P. 2, 1880). In divorce: *McElhinney* v. *McElhinney*, 13 W. N. C. 194 (C. P. 2, 1883).

137. Rule to show cause why defendant should not enter

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[60] By rule 14, sec. 1 (Rules Courts of Common Pleas of Philadelphia), security for costs cannot be demanded of a non-resident plaintiff, unless the defendant has a defence to the whole of plaintiff's claim.

In *Mason* v. *Frick*, 12 W. N. C. 570 (C. P. 1, 1883), it is held that it is too late to ask for the rule after issue joined; but see *Kirk* v. *Kern*, 13 W. N. C. 281 (C. P. 2, 1883), and *Hickok* v. *Park Asso'n.*, 14 W. N. C. 12 (C. P. 1, 1883).

Where defendant is also non-resident plaintiff cannot be required to give security; *Broat* v. *Knight*, 10 D. R. 140 (Wayne 1901), but see *Muir* v. *Lewis*, 10 D. R. 639 (C. P. 1, 1901), and *Tyler* v. *Bannon*, 30 W. N. C. 372 (C. P. 2, 1892).

security for damages and costs.[61] *Young* v. *Cooper,* 6 W. N. C. 206 (C. P. 2, 1878).

138. Rule to show cause why garnishee should not be allowed costs and expenses.[62] *Milne* v. *Buckner,* 12 W. N. C. 532 (C. P. 2, 1883).

139. Rule to show cause why actions should not be consolidated. *City* v. *Tyson,* 9 W. N. C. 367 (C. P. 2, 1880).

140. Rule to show cause why bill of costs in interpleader filed without *allocatur* should not be struck off. *Dorff* v. *Matthews,* 38 Leg. Int. 52 (C. P. 2, 1881).

141. Rule to show cause why *fieri facias* for costs in interpleader should not be set aside.[63] *Hanbest* v. *Beckhaus,* 13 W. N. C. 327 (C. P. 2, 1883).

142. Rule to show cause why execution for garnishees costs should not issue. *Griffiths* v. *Stadtmueller,* 9 W. N. C. 348 (C. P. 4, 1880).

143. Rule to show cause why *ca. sa.* for costs should

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[61] Rule 14, sec. 2 (Rules Courts of Common Pleas, Philadelphia), provides that bills of costs must be verified by parties or attorneys *M'Gervin* v. *Wanamaker,* 10 D. R. 725 (C. P. 1, 1901).

[62] Act of April 22, 1863, provides for counsel fee for garnishee; counsel to be paid out of balance in his hand after attachment and costs are satisfied in *Getzé* v. *Smith,* 1 D. R. 123 C. P. No. 1, 1891, refused to tax garnishee's counsel fee as costs because garnishee did have such a balance in hand: by the act of April 29, 1891, P. L. 35, this fee is now regularly taxed.

[63] See as to costs in interpleader; *Craig* v. *Bldg. Asso.,* 10 W. N. C. 296 (C. P. Delaware Co. 1881).

not be set aside. *Meace* v. *Crump*, 12 W. N. C. 534 (C. P. 4, 1883).

144. Rule to show cause why proceedings should not be stayed until costs of previous action are paid. *Arnsthal* v. *Fox*, 13 W. N. C. 223 (C. P. 3, 1883).

145. Rule to show cause why attachment should not issue against plaintiff for costs. *Lewis* v. *Eddy*, 6 W. N. C. 451 (C. P. 3, 1878).

146. Rule to show cause why claimants (in interpleader) should not be allowed costs. *Mausley* v. *Moore*, 1 W. N. C. 268 (C. P. 4, 1875); *Bank* v. *Emerson*, 7 W. N. C. 392 (C. P. 4, 1879); *Dewees* v. *Evans*, Ibid. 573 (C. P. 3, 1879).

147. Rule to show cause why judgment should not be entered without costs. *Kelly* v. *M'fg. Co.*, 6 W. N. C. 186 (S. C. 1878); or costs disallowed: *Samuel* v. *Scott*, 7 W. N. C. 438 (C. P. 2, 1879; *Proctor* v. *Brill*, 13 W. N. C. 252. (U. S. C. C. 1883.)

148. Rule to show cause why costs, including costs of audit, should not be taxed, and execution issue therefor against claimant, who ordered the fund into court. *Dinsmore* v. *Davis*, 7 W. N. C. 295 (C. P. 2, 1879); *Tatham* v. *Crawford*, 2 W. N. C. 367 (C. P. 1, 1876).

149. Rule to show cause why affidavit of grounds upon which the sheriff was ordered to pay a fund into court, should not be exhibited. *Brown* v. *Amos*, 2 W. N. C. 199 (C. P. 3, 1875).

150. Rule on accountant—trustee, *et al.*—to show cause why he should not pay auditor's fee. *Re Deineger Est.*, 2 W. N. C. 446 (C. P. 4, 1876).

151. Rule to show cause why respondent in proceedings *de lunatico inquirendo* should not pay costs thereof.[64]

152. Rule to show cause why defendant in a *scire facias sur claim* for benefits assessed should not have his counsel fee taxed as costs.[65]

153. Rule to show cause why plaintiff should not pay costs and charges. *Perry Township Poor Dist.* v. *Red Bank T'w'p. do.*, 8 D. R. 526 (Q. S. Jefferson, 1899).

154. Rule to show cause why judgment should not be entered for no more costs than damages covered by verdict.[66] *Savage* v. *McHale*, 8 D. R. 560 (Venango, 1899).

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[64] But where the respondent prevails he should not be obliged to pay relator's counsel fee; *Com. ex rel O'Shea* v. *O'Shea*, 10 D. R. 580 (C. P. 2, Allegh. 1901).

[65] Under act of May 16, 1891 P. L. 78, this rule may be made absolute as of course; *Allegheny* v. *Dietrich*, 8 D. R. 570 (C. P. 2, Allegh. 1899).

[66] Costs can only be collected by the execution of the judgment, an *alias fi. fa.* for costs will be quashed; *Bradley* v. *C. & M. R. R. Co.*, 8 D. R. 493 (Clearfield 1899).

X.

Rules relating to execution.

155. Rule to show cause why the sheriff should not have leave to proceed with an execution (stayed by feigned issue).[67] *Maher* v. *Conner*, 2 W. N. C. 335 (C. P. 2, 1876).

156. Rule to show cause why terre-tenant should not be allowed to enter security for stay of execution. *Ellis* v. *Cadwallader*, 14 W. N. C. 12 (C. P. 1, 1883).

157. Rule to show cause why sheriff should not be restrained in execution to certain property.

158. Rule to show cause why execution should not issue for amount remaining due on a judgment. *Gorman* v. *Mountjoy*, 6 W. N. C. 67 (C. P. 3, 1878).

159. Rule to show cause why books of a limited partnership should not be produced and execution issue against the individual members. *Bement* v. *Brick*

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[67] In ordinary cases where there has been a default by the claimant, or intervening party, as by not filing his narr, etc., within the time allowed, the practice is to make a motion before the court, or a judge in chambers for an order granting leave to the sheriff to proceed; *Hallowell* v. *Schnitzer*, 6 W. N. C. 169 (C. P. 2, 1879). As to the right of the claimant to go on with the issue without filing his bond and have the money paid into court, see *Dillon* v. *Conover*, 2 W. N. C. 126 (C. P. 4, 1875; *Shaw* v. *Kenah*, Ibid 187 (C. P. 4, 1875), and *Barnum* v. *O'Brien*, 7 W. N. C. 82 (C. P. 4, 1878).

Co., 5 W. N. C. 58 (C. P. 4, 1878); *Whitall* v. *Williams*, 6 W. N. C. 44 (C. P. 2, 1878).

160. Rule on sheriff to pay proceeds of sale of realty into court.

161. Rule to show cause why sheriff should not pay the proceeds of a sale of personalty into court.[68] *Snow* v. *Hyman*, 2 W. N. C. 352 (C. P. 2, 1876).

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[68] The proceeds of sales of personalty are not ordinarily payable into court, and a rule with regard to them requires to be allowed upon special ground shown. Applications for this purpose, however, are made with noticeably increasing frequency at the present time, and require careful attention, both from the bar and the courts, to avoid unsettling the practice and introducing great additional delay and inconvenience in realizing the proceeds of an execution. There are cases where the permission is, of course, as where claimant in an interpleader has been unable to give bond, and the sheriff has, therefore, proceeded to sell the goods. *Dillon* v. *Conover, supra; Barnum's Co.* v. *O'Brien, supra,* and there are others where, by reason of liens for rent, wages, etc., the fund is assimilated to one arising from the sale of land, and, in such sases, it is the practice to allow the payment into court. *Weis* v. *Weis,* 3 W. N. C. 76 (C. P. 2, 1876); *Kochenderfer* v. *Feigel,* 5 W. N. C. 404; C. P. 2, 1878; *Dunn* v. *Megarge,* 6 W. N. C. 204 (C. P. 2, 1878). But such cases are exceptional. As a rule, the sheriff must take the responsibility. The law he is bound to know, and the few facts that affect the right of distribution, such as priority of the writ, etc., are such as are peculiarly within his knowledge. Mere difficulty, or even danger, is not ordinarily enough, but the true principle, on which courts do interfere and assume the distribution, is that there are *rights* involved by reason of a lien, or fraud and collusion, etc., which are entitled to the protection of the courts, and for which the established action against the sheriff is not an adequate remedy. When, therefore, it is said in some of the cases that if it is unsafe for the sheriff to take the responsibility, the court will relieve him, the language used must be considered in connection with the case in hand. *Mathiews* v. *Webster,* 7 W. N. C. 81 (C. P. 4, 1879) and *Geisel* v. *Jones,* Id. 82 (C. P. 4, 1879), were both cases

162. Rule to show cause why execution should not be stayed, (*e. g.*, where an application has been made and is undetermined, to open the judgment, upon which it issues in another court). *Belding* v. *Lowe,* 1 W. N. C. 313 (C. P. 2, 1875).

163. Rule to show cause why execution should not be restrained, (*e. g.*, until plaintiff has indemnified defendant against an outstanding note). *Yerkes* v. *Mooney,* 1 W. N. C. 433 (C. P. 4, 1875).

164. Rule to show cause why execution should not be set aside. *Hanley to Use* v. *Fidelity Trust Co.,* 8 D. R. 207 (C. P. 4, 1879); or to dissolve attachment execution: *Backer* v. *Saurman,* 9 W. N. C. 403 (C. P. 1, 1880).

165. Rule to show cause why sheriff's sale of realty should not be set aside.[69]

166. Rule to show cause why a sheriff's sale of personalty should not be set aside. *Yocum* v. *Specht,* 1 W. N. C. 6 (D. C. 1874).

167. Rule to show cause why exceptions to sheriff's re-

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of alleged fraud within the rule as I have stated it, and in *Kirk* v. *Ruckholdt,* 7 W. N. C. 81 (C. P. 4, 1879), the rule was discharged. The subject was most fully and carefully considered in *Marble Co.* v. *Burke,* 5 W. N. C. 124 (C. P. 2, 1877), and the principles there laid down (followed in *Dunn* v. *Megargee* 6 W. N. C. 204 (C. P. 2, 1878), are those which ought to govern and settle the practice. There does not seem to be any case which, properly examined on the facts, is at all in conflict with these principles. *Baum* v. *Brower,* 11 W. N. C. 202 (C. P. 2, 1882).

[69] For a discussion of this rule see post page 138.

turn should not be struck off. *Craig* v. *Craig,* 1 W. N. C. 613 (C. P. 4, 1875).

168. Rule (by sheriff) to show cause why he should not have leave to pay proceeds of a sale of personalty into court.[70]

169. Rule to show cause why money should not be paid into court and execution stayed. *Fuller* v. *Blein,* 9 W. N. C. 574 (C. P. 2, 1880).

170. Rule to show cause why court should not control the order and manner of sale of real estate. *Dill's Appeal,* 13 W. N. C. 499 (S. C. 1883).

171. Rule to show cause why execution should not be restricted, in conformity to contract under which judgment was obtained, *i. e.*, to a particular fund. *McKnight* v. *Life Asso.,* 15 W. N. C. 400 (C. P. 1, 1885).

172. Rule to show cause why sheriff should not take purchaser's receipt and make special return. *Building Asso.* v. *Steele,* 10 W. N. C. 238 (C. P. 2, 1881).

173. Rule to show cause why appraisement should not be had on claim of exemption. *Vankirk* v. *Allen,* 1 W. N. C. 231 (C. P. 1, 1875).

174. Rule to show cause why appraisement should not be amended.

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[70] See rule 161 and note.

175. Rule, by defendant, to show cause why claim of exemption should not be allowed.[71]

176. Rule, by plaintiff, to show cause why claim of exemption should not be disallowed. *McCauley* v. *Rigg*, 16 W. N. C. 425 (C. P. 4, 1885).

178. Rule to show cause why appraisement should not be set aside.[72] *Com'th to Use* v. *Brown*, 9 D. R. 731 (Indiana, 1900).

179. Rule to show cause why the indorsement "exemp-

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[71] The claim of exemption may be made and established by defendant's daughter *Bank* v. *Griffith*, 8 D. R. 333 (Chester 1898).

[72] It seems that the right to exemption may not be denied without a jury trial; *Tasker* v. *Sheldon*, 19 W. N. C. 34 (S. C. 1887).

It is not usual to interfere with the sheriff in allowing or refusing the claim of exemption or the conduct of the appraisement; his liability to an action being in ordinary cases a sufficient protection to parties concerned. *Pile* v. *Grambo*, 1 W. N. C. 7 D. C. 1874; *Kiker* v. *Walker*, 7 W. N. C. 521 (C. P. 2, 1879); *Norris* v. *Town*, 1 W. N. C. 62 (D. C. 1874); *Chestnut* v. *Meace*, 3 W. N. C. 240 (C. P. 4, 1876); *Thornton* v. *Aubrey Hotel Co.*, 5 W. N. C. 428 (C. P. 3, 1878); *Bowman* v. *Tagg*, 6 W. N. C. 220 (C. P. 2, 1878). But in exceptional cases, where it *plainly* appears that the appraisement has been improperly or fraudulently conducted, the courts have interfered. *Posey* v. *Loutey*, 5 W. N. C. 291 (C. P. 3, 1878); *Norris* v. *Town*, 1 W. N. C. 51 (D. C. 1874); *Staples* v. *Wells*, 2 W. N. C. 139 (C. P. 1, 1875); *Corruman's Appeal*, 7 W. N. C. 513 (S. C. 1879); *Martin* v. *Megarry*, 8 W. N. C. 115 (C. P. 4, 1880); *Ruhl* v. *Crawford*, 13 W. N. C. 13 (C. P. 3, 1883); *Allemong* v. *Passmore*, 14 W. N. C. 124 (C. P. 1, 1883); *Wilkins* v. *Rubincam*, 15 W. N. C. 128 (C. P. 4, 1884). Where relatives of defendant were appraisers. *Bank* v. *Keen*, 1 D. R. 180 (Lanc. 1892). As to exemption where questions of law are involved; *Smith* v. *Carter*, 42 L. I. 100 (C. P. 4, 1885); *McCauley* v. *Rigg*, 16 W. N. C. 425 (C. P. 4, 1885).

tion and stay waived" should not be struck off writ of *fieri facias*. *Brown* v. *Dougherty*, 4 W. N. C. 36 (C. P. 1, 1877); (explained in *Allison* v. *Bradley*, Ibid. 150, same court); *Building Asso.* v. *Schott*, 6 W. N. C. 399 (C. P. 2, 1878).

180. Rule to show cause why inquisition and condemnation of land taken in execution should not be set aside. *Huddy* v. *Jones*, 5 W. N. C. 491 (C. P. 1, 1878); *Donahue* v. *Helme*, Ibid. 539 (C. P. 4, 1878).

181. Rule to show cause why levy and condemnation should not be set aside as to portion of the land taken in execution. *Garsed* v. *Hutchinson*, 2 W. N. C. 305 (C. P. 2, 1876).

182. Rule to show cause why an attachment of the person should not issue.[73]

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[73] It is to be noted that, being the nature of a criminal proceeding involving imprisonment for non-compliance with the order of court, notice of this rule must be served personally on the party to be attacked; service on counsel or on a deputy (when directed against an officer) not being sufficient (*Rex* v. *Smithers*, 3 T. R. 351); *Patterson C. Patterson*, 1 W. N. C. 374 (C. P. 2, 1874). But the attachment does not operate otherwise than to compel the person attached to appear and show cause why he should not be deprived of his liberty. Notice of the rule cannot be given in a foreign jurisdiction, *Russel* v. *Russel*, 11 W. N. C. 156, (C. P. 2. 1881) but may within the state; *Bullock* v. *McDonough*, 2 Pears. 195 (Dauph. 1874). The rule must explicitly state where the party attached is to appear so he may have opportunity to purge himself of contempt; *Com'th* v. *Dow*, 6 Luz. L. R. 219 (1877). A voluntary appearance of party attached, after the rule *nisi* has been entered, does not relieve him from the result (*Respublica* v. *Newell*, 3 Yeates 107). The rule will be discharged when issued against a party called by opponent to testify as in cross-exami-

(a) For not complying with an order of court under the building law. *Bowers* v. *Creighton,* 1 W. N. C. 13 (D. C. 1874).

(b) Or with an order to pay alimony. *Patterson* v. *Patterson,* Ibid. 374 (C. P. 2, 1874).

(c) Or, on the sheriff, for disregarding an order of court. *Felton* v. *Uhlinger,* Ibid. 37 (D. C. 1874).

(d) Or on a surety for contempt in giving bond under false name. *Com.* v. *Davis,* Ibid. 18 (D. C. 1874).

(e) Or to compel a witness to answer on taking of depositions. *Addicks* v. *Carrigan,* Ibid. 358 (C. P. 2, 1875); *Struthers* v. *The Bulletin,* 2 W. N. C. 261 (C. P. 2, 1876).

(f) Or on a subpœnaed witness for disregarding subpoena.

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nation, unless a *subpœna* to that end has been served upon him and his costs tendered (*Trimble et al* v. *Mulholler,* 8 D. R. 411 (Blair 1899), and it is premature if for payment of an amount claimed, until by adjudication it is definitely fixed (*Shaffer* v. *Davis,* 1 W. N. C. 374 C. P. 2, 1874).

XI.

Rules relating to mechanics and municipal claims.

183. Rule to show cause why a mechanics' lien (or municipal claim) should not be struck off.[74] *Wolfe* v. *Kelly*, 9 D. R. 515 (Schuyl., 1900); *Christ* v. *Schuylkill E. R. R.*, Ibid. 268 (Schuyl., 1900); *Benore* v. *Leonard*, Ibid. 211 (Lack. 1900); *Connell* v. *Kerr*, Ibid. 145 (C. P. 1, 1900); *Allegheny* v. *Dietrich*, 8 D. R. 570 (C. P. 2, Allegh., 1899); *Harrisburg* v. *Augenbaugh*, 8 D. R. 491 (Dauph. 1899). *Este* v. *P. R. R. Co.*, 13 D. R. 451 (C. P.

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[74] This rule is only proper where the record shows an error on its face, and can be had at any stage of the proceedings: as for example, that the claim was filed too late, that notices (when required by the law under which claim was filed), were improperly given, that the *scire facias sur claim* was too late in exit, or illegally made known, that the lien is improper in form, etc., but where the objection is to matters that do not appear of record, such as wrong parties made defendant, an affidavit of defence must be filed. As such objections are matters of fact which must be proved if they are disputed, or which the plaintiff must have opportunity to attack their sufficiency in a rule for judgment. If plaintiff succeeds in getting judgment by default, then defendant's rule, in the latter alternative must be to open judgment and be let into a defence, or if it is obtained by a *terre-tenant*, or one not party to the record to open the judgment and intervene *pro interesse suo* to make defence. In the former class of objections a reason for, should be filed with the rule and in the latter, a copy of the affidavit and rule as allowed served on plaintiff. In all cases a stay of proceedings should be asked. As to formal objections it must be remembered that amendments are permitted by statute (acts of 1901), at any time and it is of little use to raise objections to any informalities of the lien at any time. It may be truthfully said that it is difficult for the plaintiff to blunder sufficiently to invalidate his cliam.

3, 1904); *Walter* v. *Powell,* Ibid 667 (Butler 1904).

184. Rule to show cause why owner of property should not pay into court amount due on claim.[75] *Kenderdine* v. *Hueman,* 1 W. N. C. 105 (D. C. 1874).

185. Rule to show cause why a municipal claim should not be apportioned: *City to Use* v. *Penrose,* 6 W. N. C. 432 (C. P. 2, 1878).

186. Rule to show cause why judgment should not be entered for that part of a claim, to which affidavit of defence is insufficient. *Swenk* v. *Irwin,* 10 D. R. 732 (Delaware, 1901).

186. Rule to show cause why mechanics' claim should not be amended. *Freund* v. *Fenner,* 8 W. N. C. 287 (C. P. 4, 1880); *Sparr* v. *Walz,* 9 W. N. C. 64 (C. P. 2, 1880); *Young* v. *Harper,* 12 W. N. C. 304 (C. P. 2, 1882).

187. Rule to show cause why municipal claim should not be amended. *City* v. *Wagner,* 9 W. N. C. 511 (C. P. 4, 1881).

188. Rule to show cause why non-pros for want of a *narr* on *scire facias* sur municipal claim should not be struck off. *City* v. *Scott,* 8 W. N. C. 405 (C. P. 1, 1880).

189. Rule to show cause why municipal claims should

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[75] Under sec. 15, act June 4, 1901, P. L. 364, this rule does not seem to be necessary.

not be consolidated. *City* v. *Tyson,* 9 W. N. C. 367 (C. P. 2, 1880).

190. Rule to show cause why bond of contractor should not be filed to release property from mechanics' lien. *Matsinger* v. *Mullen,* 3 W. N. C. 544 (C. P. 2, 1877).

191. Rule to show cause why an item in a mechanic's claim should not be struck out. *Shields* v. *Garrett,* 4 W. N. C. 140 (C. P. 4, 1877); *Gray* v. *Dick,* 8 W. N. C. 435 (C. P. 2, 1880).

192. Rule to show cause why judgment entered on a *scire facias* sur municipal claim should not be vacated. *City to Use* v. *Merz,* 9 D. R. 369 (C. P. 4, 1900).

193. Rule to show cause why judgment on a municipal claim should not be opened, and *terre-tenant* admitted to intervene *pro inter esse suo* and defend *City* v. *Nell,* 25 Pa. Super. Ct. 347 (1904).

194. Rule to show cause why *scire facias* sur municipal claim should not be quashed.[76] *City* v. *Hiester,* 142 Pa. 39 (1891).

195. Rule to show cause why judgment by default in a mechanic's lien should not be struck off.[77] *Ruh-*

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[76] This rule is effective either before or after judgment, but if it is taken after judgment on the clause is entered, the rule should provide that the judgment be vacated or "struck off" as it is in the usual term.

[77] These objections would maintain in the case of municipal claims.

land to Use v. *Alexander*, 41 W. N. C. 16 (C. P. 4, 1897); *Johnson* v. *Schofield*, 8 D. R. 410 (Clearf., 1898).

196. Rule to show cause why judgment should not be entered for that portion of the claim for which the affidavit of defence is insufficient. *Swenk* v. *Irwin*, 10 D. R. 732 (Delaware, 1901).

197. Rule to show cause why date of claim should not be corrected.

198. Rule to show cause why claim should not be restricted to less land than against which it is filed.[78]

199. Rule to show cause why plaintiff in a mechanic's claim should not file affidavit of amount actually due. Act of June 4, 1901, sec. 75, P. L. 431.

200. Rule to show cause why *scire facias* sur municipal claim should not issue. Act June 4, 1901, sec. 15 P. L. 364. Or under this same section.

201. Why defendant in municipal claim should enter security in lieu of the claim. Act of June 4, 1901, sec. 15, P. L. 367.

XII.

Rules in divorce.

202. Rules to answer libel, etc., in accordance with the rules of court.

203. Rule to show cause why alimony and counsel fee should not be allowed. *Reeves* v. *Reeves*, 1 W. N. C. 123 (C. P. Phila. 1874).

204. Rule to show cause why libel should not be amended. *Matthews* v. *Matthews*, 6 W. N. C. 147 (C. P. 4, 1878).

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[78] Under sec. 23, act June 4, 1901, P. L. 431.

205. Rule to show cause why the case should not be withdrawn from the master and issue awarded. *Fougeray* v. *Fougeray,* 5 W. N. C. 38 (C. P. 2, 1878).

206. Rule to show cause why decree in divorce should not be vacated. *Peterson* v. *Peterson,* 6 W. N. C. 449 (C. P. 3, 1878).

207. Rule to show cause why answer should not be struck off and issue refused. *Jordan* v. *Jordan,* 13 W. N. C. 193 (C. P. 2, 1883).

208. Rule for particulars.[79]

209. Rule to show cause why list of witnesses should not be furnished where issue has been framed. *Mulleson* v. *Mulleson,* 13 W. N. C. 314 (C. P. 3, 1882).

210. Rule to show cause why libellant should not have leave to discontinue.[80]

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[79] Under act of May 25, 1878, P. L. 156, this is a rule of course and absolute in first instance.

[80] In strict law a discontinuance is always by leave of the court, and in cases where it will work hardship or injustice to another party, it is not allowed. *Kennedy* v. *McNickle,* 7 Phila. 217 (D. C. 2, 1869). In ordinary cases, however, it is the uniform practice to assume the leave of the court, without any application in fact for it, subject to be rescinded or struck off if the circumstances are such that the court would not have granted it in the first instance. See *Davis* v. *Sharpe,* 5 W. N. C. 404 (C. P. 2, 1878); *Schuylkill Bank* v. *Macalester,* 6 W. & S. 149; *Cooper* v. *Cooper,* 1 Phila. 129 (D. C. Allghey. 1849). In divorce cases, however, the practice is always to take a rule in the form above given. *Payne* v. *Grant,* 7 W. N. C. 406 (C. P. 1, 1879); *Latouche* v. *Rowland,* 12 W. N. C. 384 (C. P. 2, 1882). Where something more than mere discontinuance is desired, as that it be *nunc pro tunc,* it is the practice to take a rule; *Tisdall* v. *Paul,* 8 W. N. C. 357 (C. P. 2, 1880).

XIII.

Miscellaneous rules.

211. Rule to show cause why amendment (of record or any part of it) should not be allowed. (See Rules 11, 20, 62, 68, 98, 197, and 215).

212. Rule to show cause why order on sheriff to proceed in an interpleader should not be vacated. *Jaggers* v. *Bruner*, 1 W. N. C. 28 (D. C. 1874).

——Or order to produce papers improvidently granted. *Sollers* v. *Dunbar*, 1 W. N. C. 313 (C. P. 2, 1875).

——Or order admitting attorney to practice. *In re O'Grady*, 4 W. N. C. 199 (C. P. 1, 1877).

——Or appointment of commissioner. *Hortsman* v. *Kaufman*, 7 W. N. C. 487 (C. P. 3, 1879).

——Or order to pay money in to Court. *Garver* v. *Ward*, 9 W. N. C. 192 (C. P. 4, 1880).

——Or for examination of defendant under Act of 1879. *Loewi* v. *Hacdrick*, 8 W. N. C. 70 (C. P. 1, 1879).

213. Rule to show cause why order of Court, allowing sheriff to sell goods taken in foreign attachment, or perishable, should not be modified. *Green* v. *Kenney*, 6 W. N. C. 574 (C. P. 2, 1879).

214. Rule to show cause why entry of judgment on the index should not be erased or struck off. *City* v. *Scott,* 8 W. N. C. 405 (C. P. 1, 1880).

215. Rule to show cause why feigned issue in sheriff's interpleader should not be amended. *Horton* v. *McCurdy,* 37 Leg. Int. 377 (C. P. 4, 1880).

216. Rule to show cause why prothonotary should not note on docket certain *data*. *Myer* v. *Verner,* 10 W. N. C. 138 (C. P. 4, 1881).

217. Rule to show cause why chosing of arbitrators should not be set aside. *Swope* v. *McConsey et al.,* 8 D. R. 373 (Lanc. 1899).

218. Rule to show cause why decree by divided Court opening a judgment should not be vacated. *Hoyt* v. *Wilmer,* 13 W. N. C. 130 (C. P. 3, 1883).

219. Rule to show cause why a party may not act in any respect *nunc pro tunc:*

——To move for a new trial: *Helmbold* v. *Cawley,* 1 W. N. C. 41 (D. C. 1874).

——To file an appeal: *Kelly* v. *Gilmore,* 1 W. N. C. 73 (D. C. 1874). *Schreman* v. *Sternberger,* 7 W. N. C. 111 (C. P. 3, 1879).

——To amend assessment of damages. *Samuel* v. *Scott,* 7 W. N. C. 438 (C. P. 2, 1879).

——To discontinue the action. *Tisdall* v. *Paul,* 8 W. N. C. 357 (C. P. 2, 1880).

——To file answer to libel in divorce. *Schneider* v. *Schneider,* 9 W. N. C. 253 (C. P. 3, 1880).

——To file statement in interpleader. *Kiker* v. *Weightman,* 9 W. N. C. 274 (C. P. 3, 1880).

——To file depositions. *Asso.* v. *Goldbeck,* 12 W. N. C. 533 (C. P. 2, 1883).

——To file affidavit of defence. *Beattie* v. *Deichler,* 15 W. N. C. 224 (C. P. 1, 1884).

——To file affidavit under the Act of July 9, 1901, P. L. 614. *King* v. *Grannis,* 12 D. R. 330 (Warren, 1903).

220. Rule to show cause why proceedings should not be stayed. *Longstreth* v. *Thornton,* 9 W. N. C. 206 (C. P. 2, 1880).

——Until costs in former action are paid: *Smith* v. *Urian,* 11 W. N. C. 284 (C. P. 3, 1882).

221. Rule to show cause why agreement of parties should not be struck from record. *Miller* v. *Gallagher,* 1 W. N. C. 374 (C. P. 3, 1875); *Hagarty* v. *Morris,* 2 W. N. C. 154 (C. P. 2, 1875).

222. Rule to show cause why proceedings should not be transferred from another Court and approved *nunc pro tunc.*[80] *In re Baker's Estate,* 2 W. N. C. 198 (C. P. 2, 1875).

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[80] Since the adoption of the method of assigning cases in Philadelphia County by lot to one of the five Courts of Common

223. Rule to show cause why record and proceedings should not be removed to the United States Courts. *Belt* v. *Montgomery,* 1 W. N. C. 265 (C. P. 2, 1875); *Loffler* v. *Ins. Co.,* Ibid. 346 (C. P. 4, 1875); *Huddy* v. *Havens,* 3 W. N. C. 342 (C. P. 2, 1877).

224. Rule to show cause why petition for removal should not be set aside.[81]

225. Rule to show cause why an *exoneretur* should not be entered. *Com. ex rel* v. *Maloney,* 3 W. N. C. 407 (C. P. 1, 1877).

226. Rule to show cause why order of sale in partition should not be set aside. *Young* v. *McIntyre,* 6 W. N. C. 252 (C. P. 1, 1878).

227. Rule to show cause why a release of mortgage should not be vacated. *In re Meloy Mortgage,* 8 D. R. 364 (Cumberland, 1899).

Pleas of Philadelphia County, this is a rule of course, but not absolute in the first instance, cause must be shown, and the custom prevails to take the rule in the court to which the later case is assigned. It will be made absolute where the question raised by the later case is pending in another phase, in another court, or where the parties are the same, or where proceedings in Equity are the outcome of an action at law determined in another court. The reason for the practice is too obvious for explanation.

[81] It would seem that the object of this rule would be as well attained in the disposition of such a rule as 222: and it is doubtful that this rule would be made absolute unless it were allowed by the court upon peculiar facts which would establish extraordinary jeopardy to the party upon the final adverse disposition of rule 222.

228. Rule to show cause why one should not be subrogated to the rights of another. *Fox* v. *Litwiler*, 12 D. R. 337 (Columbia, 1902).

229. Rule to show cause why a next friend should not be removed and another substituted. *Ruffel* v. *Police B. A.*, 9 D. R. 182 (C. P. 4, 1900).

230. Rule to show cause why Plaintiff should not have leave to appear in person before a Commissioner, and orally to examine all witnesses as may be examined, in a foreign jurisdiction under commission issued in behalf of defendant. *Parsons, Administrator* v. *Middleton*, 9 D. R. 53 (C. P. 4, 1900).

231. Rule to show cause why one judgment should not be set off against another, and the difference between them accepted in satisfaction. *Higgins* v. *Dunkelberger*, 9 D. R. 91 (Schuylkill, 1900).

232. Rule to show cause why judgment should not be vacated and writ of *scire facias* quashed: *Seymour et al* v. *Fulton*, 9 D. R. 611 (York, 1900).

233. Rule to show cause why an order to open a judgment should not be vacated. *Hoyt* v. *Wilmer*, 13 W. N. C. 130 (C. P. 3, 1883).

234. Rule to show cause why claim of exemption should not be set aside. *Hayes* v. *Lentz*, 8 D. R. 628 (Montgomery, 1899).

235. Rule to show cause why substituted security should not be struck off and lien re-instated. *Sulzer* v. *Ross*, 12 Pa. Super. Ct. 206 (1900).

236. Rule to show cause why an application for a charter should not be withdrawn. *In re Philadelphia Association,* 7 W. N. C. 146 (C. P. 2, 1879).

XIV.

Rules provided for by statute.

237. Rule to produce books, papers or documents at trial. Act of Feb. 27, 1798, 3 Sm. L. 303.

238. Rule to show cause why purchase of land at a tax sale should not reconvey to the owner. Act of May 18, 1856.

239. Rule for interpleader. Act of March 11, 1836, (sec. 4), P. L. 7. *Vandegrift* v. *Freeman*, 1 W. N. C. 109 (D. C. 1874). Or under act of May 26, 1895, P. L. 95. (See *Meyer* v. *Jeske*, 8 D. R. 229 (Pike 1898).

240. Rule for Bill of Particulars in Divorce. Act of May 25, 1878, P. L. 156.

241. Rule to show cause why Court should not order satisfaction of jududgment. Act March 14, 1876, P. L. 7.[82] *Shayler* v. *Parsons*, 1 Pa. Super. Ct. 281 (1892); *Melan* v. *Smith,* 134 Pa. 649 (1890).

242. Rule to show cause why ejectment should not be brought. Act of June 25, 1885, P. L. 152. *Great N. P. Co.* v. *Yates,* 8 D. R. 523 (Warren, 1899).

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[82] It is doubtful whether this rule is proper in the case of an assigned judgment.

243. Rule to show cause why judgment should not be rendered for amount admitted to be due. Act of May 31, 1893, P. L. 185. *Calkins et al* v. *Keely*, 3 D. R. 339 (C. P. 2, 1894).

244. Rule for an issue in Sheriff's Interpleader. Act of May 26, 1895, P. L. 95.

245. Rule to show cause why plaintiff in Mechanics' Lien should not file affidavit of amount actually due. Act of June 4, 1901, sec. 25, P. L. 431. Same in Municipal Claim. Act of June 4, 1901, sec. 15, P. L. 364.

246. Rule to show cause why *scire facias* sur Municipal Claim should not issue. Act June 4, 1901, sec. 16, P. L. 364, and under section 15.

Why defendant should not enter security in lien of the claim.

VII.

The Statement of Claim.

1. The Act of Assembly approved May 25, 1887, P. L. 271, effected great changes in the forms of practice, actions based on the contractual relation being grouped under *assumpsit* and those *ex delicto* in *trespass*. The Act was supplemented in Philadelphia by the Rule adopted by the Courts of Common Pleas (Rule 30, sec. 2, 3, and 4). Section 3 of which requires the statement of claim to be fortified by the affidavit of plaintiff as to the truth of the averments, and this whether it is an action in *assumpsit* or *trespass*. The act itself does not require it. Under the old practice, before the act of 1835, the plaintiff filed a declaration, and it was to the cause of action set out therein that defendant made his affidavit. In *Dewey* v. *Dupuy*, 2 W. & S. 556 (decided by the Supreme Court in 1841), Judge Sergeant, who had been a judge of the District Court, and had in his mind the old practice, says that the plaintiff may file a declaration or statement, and "defendants may be compelled to answer the averments contained in them." The judge was arguing that a declaration was not *necessary*, though it might be filed, and the point decided in the case, indeed, was that a narr. was not necessary to support a judgment for want of a sufficient affidavit of defence.

Yet the incidental expression that defendants might be compelled to answer averments (coupled, perhaps, with some expressions by Rogers, J., in *Bank of United States* v. *Thayer*, at the same term, 2 W. & S. 447), was made the foundation of a practice extending the affidavit of defence law, by means of supplementary averments, to cases which had not previously been considered within the act. Without going through the cases in detail, it is sufficient to say that the present practice is settled in *Imhoff* v. *Brown*, 30 Pa. 504 (1858) where the rule is laid down by Porter, J., as the better practice "to confine the plaintiff to his copy, and a statement respecting the extent of his claim, and his right to sue, and not to permit him to allege facts against the defendant, in the absence of which a recovery would be impossible." In *Dickerson* v. *McCausland*, 3 W. N. C. 327 (C. P. 3, 1877), the rule is expressed by Ludlow, P. J.: "The function of an averment supplementing a copy filed is to liquidate a sum for which the defendant's liability is fixed by the instrument sued on." In *Detmold* v. *Coal Co.*, 3 W. N. C. 567 (U. S. D. C. 1876), Cadwalader, J., says, the "book entries filed to assist the assessment of damages tend to extend, and not to limit the claim, as shown by the copies of the instruments of writing. Such a purpose is not within the rule allowing averments to be filed with copies of instruments." But in *Collins* v. *O'Toole*, 3 W. N. C. 564 (C. P. 4, 1877); *Koelle* v. *Engbert*, 4 W. N. C. 202 (C. P. 4, 1877; *Morris* v. *Guier*, 5 W. N. C. 132 (S. C. 1878); *Fox* v. *Mausman*, 5 W. N. C. 511 (C. P. 4, 1878); *Scott* v. *Loughrey*, 6 W. N. C. 123 (C. P. 1, 1878); *Bunting* v. *Allen*, Ibid. 157 (C. P. 3, 1878); *Gercke* v. *Montgomery*, Ibid. 238 (C. P. 3, 1878); *Dundore* v. *Dobson*, Ibid. 299 (C. P. 1, 1878), and *Comth* v. *Maguire*, 12 W. N. C. 304 (C. P. 2, 1882), the effort was made, unsuccessfully, to help out the instru-

ment sued on by an averment altering or extending defendant's liability.

These were the conditions which developed the act of May 25, 1887, commonly called "the practice act."

2. But for all that, there was no attack made upon the Act itself, its constitutionality does not seem to have been assailed seriously, in fact no case involving the question appears in the State Reports and in the County Courts but one. *Honeywell* v. *Tonery*, 5 Kulp, 360, C. P. Luzerne County decided June 29, 1889, by Judge Rice. The report of the case does not indicate that stress was laid on the unconstitutionality of the Act, which was sustained in a two line sentence in the beginning of Judge Rice's opinion. The pioneer case under this act in the Supreme Court is *Gould* v. *Gage, et al.,* 118 Pa. 559, decided Feb. 6, 1888, reversing C. P. No. 4 of this county, which established the practice as to the requisites in the statement, as to a copy of the instrument basing the action, and also as to the necessity of explicit averments in the affidavit of defence, showed that there was no intention on the part of the Courts to recede from at least the spirit of the earlier practice, even if the ways and forms had to be forsworn.

This was followed by *Byrne* v. *Hayden*, 124 Pa. 170, decided Feb. 11, 1889. Mr. Justice Sterrett in delivering the opinion of the Court, says: "The Act of 1887 providing for filing statement of claim, etc., was intended to have a wider scope than the old affidavit of defence law. It is necessary, however, that the statement should contain all the ingredients of a complete cause of action averred in clear, express and unequivocal language, so that if the defendant is unable to controvert or deny one or more of the material averments of a claim, a judgment in default of an affidavit or sufficient affidavit of defence, may be entered and liquidated" and again in *Fritz* v.

Hathaway, 135 Pa. 274, (May 26, 1890) Mr. Justice Mitchell speaking for the Court, says: "As to all matters of substance, completness, accuracy and precision are as necessary now to a statement as they were before to a declaration in the settled and time honored forms." And this is reiterated by Mr. Chief Justice Sterrett in similar language in *Peale* v. *Addicks*, 174 Pa. 543 (1896).

Rule 30, sec. 3. (Rules Courts C. P. Philadelphia), requires that "Plaintiff's statement of claim shall contain a specific averment of facts sufficient to contain a good cause of action. It shall be supported by an affidavit of the truth of the matters alleged as the basis of the claim and shall in all cases where damages are capable of liquidation contain an explicit averment of the amount due." Unless a "good cause of action" be shown in the manner required as to "completeness, accuracy and precision," a rule for judgment for want of a sufficient affidavit of defense will be discharged: *Capital City Ins. Co.* v. *Boggs*, 172 Pa. 91 (1896); that is to say, it must aver every fact necessary to constitute the cause of action: *Gould* v. *Gage*, 118 Pa. 559 (1888). Although informality in averring them will not impair its validity, *Smith* v. *Smith*, 166 Pa. 353 (1895); *Aggue* v. *Phila. & Frankford R. R.*, 3 D. R. 96 (C. P. 4, 1893).

Section 3 of the above cited rule of court requires that "in all cases where damages are capable of liquidation [the statement of claim] shall contain an explicit averment of the amount claimed to be justly due." This was interpreted in the earlier practice under the act, that the averment must be made *in hæc verba*. *Gould* v. *Gage*, 118 Pa. 559 (1888). And while the exact point was not the basis of the reversal of the lower court, yet many practitioners considered it authority on the interpretation of the rule, as stated, see *Schafer* v. *Brotherhood*, 22 W. N. C. 312, (C. P. 3,) decided in 1888

after *Gould* v. *Gage*. But *Smith et al.* v. *Smith, supra*, settles the question that formality in the statement is a non-essential; the court (Mr. Justice Mitchell) saying "The main requirement of the statement under the Act [of May 25, 1887,] is to secure to the defendant clear and exact information as to what is claimed of him."

This same rule of court also provides that "the truth of the matters alleged as the basis of the claim" must be sustained by plaintiff's affidavit: the act itself making no such provision; *Ehret* v. *Lewis*, 7 Pa. C. C. 108 (Luzerne 1889). Common Pleas No. 2 in 1888 in *Krauskopf* v. *Stern*, 21 W. N. C. 185, required an affidavit to a statement *in trespass*.

Where the action is on *quantum meruit* the statement must aver that the prices of goods sold and delivered as set out in the copy rendered are the usual market rates, and that the goods, etc., were of the standard value: so also where the suit is for services rendered, unless the plaintiff can set up a contract stipulating the recompense for the services and that they were rendered, he must aver that the amount claimed is usual for such services and that they were worth the amount claimed, unless he do this, plaintiff's statement will not entitle him to summary judgment upon an insufficient affidavit of defence, and he will be sent to a jury to prove his claim. *Murphy* v. *Taylor*, 173 Pa. 317 (1896).

If Plaintiff's claim be based upon a written instrument it must show a *prima facie* present existing obligation to pay money. *Creighton* v. *Nat'l. Supply Co.*, 10 D. R. 600 (C. P. 2, Allegheny, 1901), and must be set out in full in the statement, if brief, cheque, draft, note of hand, or a few item bill, let it be incorporated in the body of the statement, but if long, a contract, penal bond, lease, etc., it should be attached to the statement which must contain an averment of its accuracy and it should also by words be made "part of" the statement.

VIII.

Requisites of the claim.

1. The obligation which is the basis of the claim, must appear to be *present* at the time of suit. Therefore, if the time for performance, as shown by the instrument, has not arrived (though there may be a present right of action on other grounds), there can be no judgment on the copy. *Titus* v. *Bell*, 4 W. N. C. 380 (C. P. 2, 1877); and even if the apparent prematureness of the suit is by a clerical error in the copy. *Guskey* v. *Sparter*, 1 W. N. C. 470 (C. P. 2, 1875); *Creighton* v. *Supply Co.*, 10 D. R. 600 (C. P. 2, Allegheny, 1901).

2. It must be *absolute*. A conditional promise, therefore, is not sufficient. *Edeline* v. *Homestead Ass'n.*, 4 W. N. C. 509 (C. P. 1, 1877). And this rule excludes all promises which are merely to guarantee or indemnify. *Bernstine* v. *Garaghan*, 1 W. N. C. 506 (C. P. 2, 1875); *Artisans' Ass'n.* v. *Noris*, 1 W. N. C. 110 (D. C. 1874); *Scott* v. *Loughery*, 6 W. N. C. 123 (C. P. 1, (1878).

3. It must be on the *defendant*. Therefore book entries which do not contain any name are insufficient. *Wall* v. *Dorey*, 60 Pa. 212; *Rothermel* v. *Polytechnic Coll.*, 7 W. N. C. 16 (C. P. 3, 1879), or which contain only defendant's last name, *Williamson* v. *Earp*, 5 W. N. C. 40 (C. P. 4, 1877), or a deed *to* defendant, not signed by him, even though it may support an action, *Morris* v. *Guier*, 5 W. N. C. 132 (S. C. 1878), or where

the obligation does not appear to be from defendant to the plaintiff. *Prahl* v. *Smaltz*, 6 W. N. C. 571 (S. C. 1879).

4. It must be to pay *money*. An agreement to pay in goods, or in trade, etc., is not within the act. *Cozens* v. *Thayer*, 1 W. N. C. 267 (C. P. 3, 1875); *Gould* v. *Richardson*, 33 Leg. Int. 158. But an agreement primarily payable in money, is not taken out of the act by an option on the part of the debtor to pay in goods. See *Singerly* v. *Caldwell*, 88 Pa. 312. It is well settled that a promise to pay in goods, not performed according to its tenor, becomes an obligation to pay in money. *Moore* v. *Kiff*, 2 W. N. C. 451 (S. C. 1876); *Singerly* v. *Armstrong*, 5 W. N. C. 139 (S. C. 1878). The judgment for want of an affidavit of defence, however, being a special statutory remedy, does not necessarily follow a right to recover in money, and in the class of cases last mentioned therefore, in which the primary obligation is only to pay in goods, the plaintiff will not be entitled to such judgment unless in exceptional cases, where the default of the defendant by which the obligation has become payable in money appears on the face of the instrument, as, *e. g.*, where the duty was to deliver the goods at a stipulated time before the suit was commenced. Where the goods are to be demanded by the plaintiff, the instrument is not within the act. *Fox* v. *Mausman*, 5 W. N. C. 511 (C. P. 4, 1878). Nor is an instrument transferring or pledging title, though it contains an admission of debt. *Vandike* v. *Ward*, 8 W. N. C. 418 (C. P. 2, 1880).

5. The instrument sued on may consist of more than one writing. Thus, a bond to pay money or lease with covenant of lessee to pay rent and a separate covenant of suretyship is a good instrument against the surety. *Korn* v. *Hohl*, 80 Pa. 333 (1876); or a written contract

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of suretyship and book entries against the principal. *Seltzer* v. *Greenwald,* 2 W. N. C. 395 (C. P. 1, 1875); *Howell* v. *Herold,* 6 W. N. C. 431 (C. P. 2, 1878). So where it is desired to obviate a defence which has been rendered inadmissible by writing, as, *e. g.,* by a certificate of no set-off to a mortgage. *Hunter* v. *Campbell,* 1 W. N. C. 109 (D. C. 1874); or a written agreement on which accommodation notes were given. *Rhine* v. *Rheinstrom,* 1 W. N. C. 131 (D. C. 1874); or a bond of one not a party for payment of costs and decree fixing amount. *Kase* v. *Greenough,* 7 W. N. C. 535 (S. C. 1879).

6. An important class of cases, namely, those arising upon instruments which are executory on the plaintiff's part, or which from any reason require averments supplementary to the copy filed, to complete the showing of defendant's liability, have been the source of difficulty and of discrepancy in the decisions from time to time since the beginning of statutory judgments for want of affidavits of defence.

Under the agreement of the bar alluded to (*Post* p. 114), an affidavit was required in *all cases;* and under the rules of court subsequently adopted, the affidavit was required in all actions of *debt or contract.* See *Vanatta* v. *Anderson,* 3 Binn. 417 (1811); and *West* v. *Simmons,* 2 Wh. 261 (1837).

The class of cases which we are now considering were, therefore, clearly within the practice up to the passage of the act of 28th March, 1835. That act was the first legislative sanction of judgments for want of affidavits of defence, and it made two notable changes in the existing practice. The old practice had only required the defendant to swear that "to the best of his knowledge and belief there was a just defence" (3 Binn. 417); the new act required him to state in his affidavit "the nature and character" of the defence, that is, to submit the suffi-

ciency of it to the judgment of the court. But, on the other hand, the act relieved the defendant from the necessity of an affidavit, except in the specified cases of actions on bills, notes, and instruments for the payment of money. Of course the question at once arose as to what were instruments for the payment of money within the meaning of the act, and it was held that they must be for *absolute* payment, and not merely conditional or for indemnity. The special class of executory instruments, in which something still remains to be done by the plaintiff, which we are now considering, came before the District Court in 1836, in *Montgomery* v. *Johnston*, 1 Miles, 325, (D. C. 1836), and were held not to be within the then recent act. This continued to be the practice until 1850, when the District Court, under the influence of *Dewey* v. *Dupuy*, 2 W. & S. 556, to which reference will be made presently, changed its ground, and in *Rile* v. *Worl*, 1 Phila. 45, (D. C. 1850), entered judgment upon such an instrument. How long this new turn in practice continued the reports do not enable me to say, "but" said Mr. Justice Mitchell in his first edition of Motions and Rules, "I have the authority of Judge Hare's recollection that it was not long, and I find on the margin of my 1 Philadelphia Reports a note of my own, that in March, 1873, when *Rile* v. *Worl* was cited in the District Court, it was unanimously repudiated, with the remark that the practice was long settled against it." The question, however, would seem to be irrepressible, for it came up again before the Court of Common Pleas No. 4, in *Sutton* v. *Athletic Club*, 4 W. N. C. 90 (C. P. 4, 1877) and that court gave judgment upon an executory agreement closely similar to the one in *Rile* v. *Worl*, citing that case as an authority.[81]

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[81] *Journal* v. *Reeves*, 17 W. N. C. 222 (C. P. 1, 1885), was decided upon the authority of *Sulton* v. *A. Club*.

There does not seem to be any decision upon the question by the Supreme Court. The one coming nearest to it is *Fertig* v. *Maley*, 5 W. N. C. 133 (S. C. 1878) in which a judgment was sustained on an agreement by which plaintiff sold to defendant all the ice that should be formed on a certain point, and covenanted not to interfere with the cutting, etc. This case, however, does not touch the real point of controversy, for the defendant had promised to pay a sum certain at a time fixed, which had expired before suit brought, and the only executory undertaking of plaintiff was *not* to interfere, a negative which the law would presume for him in the absence of evidence to the contrary.

Sutton v. *Athletic Club* was not followed by any other court, though there are a few cases which indicate that the weight of a considered opinion by the learned president of court No. 4 has not been without its natural effect, in producing a hesitation and uncertainty upon the subject. There are, however, later cases in all the other courts of this county (reference to which will be made presently in discussing the subject of averments) which are inconsistent in principle with that decision, and which must be taken as virtual refusals to follow it. Notwithstanding that decision, therefore, the established present general rule of practice is that instruments for the payment of money dependent on a consideration which is executory on the part of plaintiff, are not within the affidavit of defence law, whether aided by supplementary averments or not.[82]

7. Besides agreements executory in the sense we have

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[82] Court of Common Pleas, No. 2 (1881) in *King* v. *Exhibition Co.*, 10 W. N. C. 190, declined to recognize *Sutton* v. *Athletic Club*, as authority and was followed in this decisson by C. P. No. 3, in 1882 in *Farren* v. *Harned*, 12 W. N. C. 16.

been considering, there are a large class of cases in which the instrument sued on does not show a complete liability on the part of the defendant without the aid of supplementary averments. The scope of such averments has been the subject of much discussion and some discrepancy in the decisions, and though it is now, and has been for a considerable time, pretty well settled, yet the persistency with which it comes up again and again shows that it is one of the questions, like that of executory agreements, which will not stay settled without a considerable effort of the courts to preserve consistency in the decisions.

Under the old practice, before the act of 1835, the plaintiff filed a declaration, and it was to the cause of action set out therein that defendant made his affidavit.

Under the Act of 1887 the practice has returned to the same rule, and what is said under the present head (VIII) as to the requirements of the instrument on which the action is founded must be read in connection with that rule.

8. Of course the plaintiff is entitled, in addition to the actual language of the instrument sued on, to the aid of all the facts and the law, of which the court will take judicial notice. Thus the lapse of time, by which the promise to pay has become a present obligation, will be considered by the court; and so the legal effect of acts which appear on the instrument, as, *e. g.,* the indorsement of commercial paper, etc. *McConeghy* v. *Kirk,* 68 Pa. 200 (1871).

9. The general rule, then, by which to test the sufficiency of an instrument of writing, to entitle plaintiff to judgment for want of an affidavit of defence, is that *it must upon its face, with the aid of such matters of fact or law as the court will take judicial notice of, show a prima facie present obligation on the defendant to pay money.*

The rule is frequently expressed in the concise and admirable pratical test, could the plaintiff go to the jury on proof of the writing filed, without more? *Ins Co.* v.

Brierly, 10 W. N. C. 45 (S. C. 1881), see also *Love* v. *Bld. A.*, 11 W. N. C. 303 (C. P. 2, 1882).

This is the rule to which the decisions time and again return, and which may be considered as the present established rule. It is a plain, practical, and practicable rule, which ought not to be disturbed or departed from without good reason.

10. The copy of the instrument of writing sued on should be distinctly entitled as such, and must be averred to be an exact copy.[83]

11. In *Graff* v. *Chrisman*, 2 W. N. C. 66 (C. P. 2, 1875), it was decided that a mere bill was not a good copy of book entries, but it has been since settled differently by the Supreme Court. In *Snyder* v. *Richardson*, 3 W. N. 272 (C. P. 2, 1876) no question was raised as to the copy being a bill, and the only points made by the defendant were that the copy was not *entitled* as a copy on the face of it, but merely *indorsed* on the outside of the paper as such, and that there was a variance between the copy filed and the original entries on the books. There had been some little tendency in the courts towards vacillation on the question of the sufficiency of a mere billhead, but the practice had been settled in the District Court, and the Court of Common Pleas No. 2 had followed it in *Graff* v. *Chrisman*, 2 W. N. C. 66. No such

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[83] The copy must be set out in the statement, attached to it and by averment made part of it, *Acme Co.* v. *Reid*, 181 Pa. 382; and it must be of the whole instrument, *Lee* v. *Cooper*, 8 Pa. C. C. 481 (C. P. 3, 1890); while the statement need not own that the contract sued on is in parol or writing, *Lentz* v. *Carey*, 8 Kulp, 259 (Luzerne 1896). If it be in writing it is not sufficient to charge the defendant unless it is set out. *Bank* v. *Gardner*, 171 Pa. 267 (1895).

question, therefore, was raised or intended to be decided in *Snyder* v. *Richardson*. But when this case came before the Supreme Court, 6 W. N. C. 414, it was argued on an entirely different ground, and the court not only affirmed the judgment on the ground on which it had been decided, viz., that advantage of a variance could only be taken by a rule to produce the original for inspection, but also added that the billhead was mere surplusage, which did not vitiate the copy.

12. It is always advisable that the copy should be carefully compared with the original before suit. Should the variance be such as to make it a substantially different instrument, even though by a mere clerical slip in the date, amount, etc., plaintiff runs the risk of an affidavit that will be sufficient to prevent judgment, and put him to the delay of a jury trial, or to a discontinuance and a new action with a correct copy.

13. Inaccuracy of the copy of instrument sued on, however, unless amounting to a substantial defect which will enable the defendant to deny the cause of action thereby set forth, is not in general a safe ground on which to rest an affidavit, but defendant should, as already mentioned, rule the plaintiff to produce the original books or writings for inspection, and the variance can then be taken advantage of. *Richardson* v. *Snyder*, 6 W. N. C. 414 (S. C. 1879).

It may be raised by specific allegations of variance. *Laubauch* v. *Myers*, 147 Pa. 447 (1892).

14. The copy may contain abbreviations or technical words, and will nevertheless be sufficient if intelligible to persons in the business. If the whole copy is so obscure that defendant cannot understand what is thereby charged against him, he should so aver in his affidavit.

A mere suggestion to that effect is not sufficient. *Brown* v. *Dupuy,* 4 W. N. 491 (S. C. 1877); and see *Barraos* v. *Brandeis,* 1 W. N. C. 7 (D. C. 1874); *Miller* v. *Brandeis,* 1 W. N. C. 62 (D. C. 1874); *Catherwood* v. *Moore,* 1 W. N. C. 109 (D. C. 1874); *Graff* v. *Chrisman,* 2 W. N. C. 66 (C. P. 2, 1875); *Uhler* v. *Kohler,* 2 W. N. C. 67 (C. P. 2, 1874); and *Cooper* v. *Ranakin,* 2 W. N. C. 428 (C. P. 3, 1876).

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[84] If the allegation of inaccuracy is general, the plaintiff may produce the original instrument and the court will pass upon the question. *Bancroft* v. *Haines,* 2 D. R. 373 (C. P. 4, 1892).

The act of May 21, 1887, P. L. 271, has not changed this practice. *Warnecke* v. *Sherman,* 22 W. N. C. 225 (C. P. 4, 1888); *Bancroft* v. *Haines,* 31 W. N. C. 248 (C. P. 4, 1892); nor has it raised the standard as to accuracy in affidavits of defence (Hare P. J. in *Boomer* v. *Henry,* 2 D. R. 357 C. P. 2, 1893).

IX.

Affidavit of defence.

1. Section 6 of the act of May 26, 1887, requires defendant to file an affidavit of defence in fifteen days after service of the statement of claim upon him. In computing the fifteen days the day of service of the statement is not counted.

The affidavit of defence must be made by the defendant himself,[85] or if there are special reasons why that cannot be done, they must be set forth so that the court may judge of their sufficiency; and in that case the person who makes the affidavit must also set forth specifically his means of knowledge of the facts. This is and has been the settled practice for a long time, notwithstanding *Sleeper* v. *Dougherty,* 2 Whart. 177; *Hunter* v. *Reilly,* 36 Pa. 509; and some other cases which seem to allow a looser rule. See *Marshal* v. *Witte,* 1 Phila. 117 (D. C. 1850); *City* v. *Devine,* 1 W. N. C. 358 (C. P. 2, 1875); *Stollaker* v. *Lardner,* Id. 169 (C. P. 4, 1875); *Russell* v. *Foran,* Id. 470 (C. P. 2, 1875); *City* v. *Peterson,* 3 W. N. C. 292 (C. P. 4, 1876); *City* v. *Gross,* 2 W. N. C. 429; *Cowperthwait* v. *Roney,* 10 W. N. C. 482 (C. P. 4, 1881); *Kramer* v. *Cameron,* 17 W. N. C. 220 (C. P. 1, 1886). A good practice, not so often followed as it

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[85] Even though he will be incompetent as a witness at the trial to prove the matters averred in affidavit. *Schackenman* v. *Vollrath,* 1 W. N. C. 149 (O. C. P. 1875).

should be, is to have the defendant's own affidavit, as far as his knowledge or information permit him to go, making reference to and supported by the additional affidavit of the party specially cognizant of the facts. See *Bank* v. *Detwiler*, 8 D. R. 515 (Northampton, 1899). Rule 3 of the Court of Common Pleas of Philadelphia, requires executors and "others sued in a representative capacity" to make affidavit of defence. But the rule by its terms is complied with if the affidavit avers that the affiant has made diligent inquiry and has not been able to secure sufficient information to enable him to set forth particularly the character and nature of the defence but that he believes there is a just and legal defence.[86]

Fifteen full days after serving a copy of the statement and of the rule to file affidavit of defence or to plead—according as the case was in *assumpsit* or trespass to plead in default of such *affidavit* or *plea* on motion entered in the prothonotary's office judgment may be entered by default. Proof of service of the copy of statement and rule must accompany or be part of the motion but the averments of how the serive was made must be explicit. *Connolly* v. *Wilson*, 6 Pa. C. C. 421 (Lawrence, 1889). Service of these copies however may be made upon defendant at any place. (*Cochran* v. *Pyle*, 10 Pa. C. C. 198 (Chester, 1898). And may be made even before the summons is served. *Roseman* v. *Haydock*, 21 W. N. C. 121 (C. P. 2, 1888), but the most satisfactory method is to let the sheriff serve the copy of state-

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[86] An averment in the affidavit that "defendant is informed that" (a certain fact essential to plaintiff's case, and alleged in the statement of claim) "is not true" is insufficient to prevent judgment. *Phila. to use* v. *Pearson*, 211 Pa. 382 (1904). Nor cannot it aver as defense, both non-payment and compromise and request a certificate; *Hibberd* v. *Mullen*, 14 D. R. 419 (C. P. 3, 1905).

ment and rule at the time he serves the summons on defendant. If the statement is found to be wanting in respect to any material averment, either that it is improperly or insufficiently stated, plaintiff may have leave to file an amended statement. Generally speaking an affidavit of defence may not be demanded to an amended statement *Niagara Ins. Co.* v. *Thorn,* 4 Pa. C. C. 308, (C. P. 1887) but the court in allowing an amendment to statement may stipulate that judgment may be entered for want of a sufficient affidavit of defence with a reasonable time. *Hoke* v. *Martin,* 7 York L. R. 65 (York, 1893).

If counsel makes the affidavit it must be a positive averment of his own knowledge. *Russell* v. *Foran supra Crine* v. *Wallace,* 1 W. N. C. 293 (S. C. 1874). Plaintiff cannot dispute the right of one, who has bound himself to pay a judgment which may be recovered on a claim against another, in a suit against the principal debtor. *Urich* v. *Zern,* 2 D. R. 55 (Lebanon, 1892). In the absence or incapacity of defendant, another who has full personal knowledge of the facts, may make affidavit of defence in defendant's stead, but the averments must be full and precise. *Beattie* v. *Deichler,* 15 W. N. C. 224 (C. P. 1, 1884); *Rau* v. *Lex,* 2 Mona. 87 (1889).

2. The affidavit must be a specific statement of facts. The words of the act of 1835 are that it must set forth "the nature and character" of the defence. Under this it has been uniformly held that affidavits merely argumentative, or containing only inferences or conclusions of law, are bad. So if the averments are merely general, especially where they use words which raise mixed questions of law and fact, such as payment, warranty, surrender, etc., and allegations of fraud. In all these cases it is necessary to set out the facts, as, *e. g.*, when, how, and to whom the payment, surrender, etc., was made,

the specific acts or representations which are alleged to constitute fraud, etc., and without such facts no general averments that defendant has a "just, full and legal defence" or "is not indebted to plaintiff in any sum whatever" or any similar phrases will be sufficient to prevent judgment. *Noble* v. *Kreuzkamp*, 111 Pa. 68 (1886).

An affidavit of defence which sets forth facts in themselves insufficient is not made good by a general averment that defendant has a "just and true defence to the whole of plaintiff's claim. *Kelly* v. *Shillingsburg*, 2 Pa. Super. Ct. 576 (1896). And where there is an absence of specific denial of facts in plaintiff's statement in case of doubt, construction will be against the affidavit. *McKay et. al.* v. *McKenna*, 173 Pa. 581 (1896).

3. In form the affidavit may be either a categorical averment of the facts, as of affiant's own knowledge, or it may be upon information and belief. *Ellison* v. *Freiling*, 1 W. N. C. 109 (D. C. 1874). If intended to fall within the latter class, the established formula is that deponent is *informed, believes, and expects to be able to prove* the facts set out. This formula into which the long experience of the District Court had crystallized, has not been always regarded by the Supreme Court in the reported cases, but it has been steadily adhered to by the courts of Philadelphia County, and it is believed will always be recognized by the Supreme Court when their attention is directed to a departure from it. See *Black* v. *Halstead*, 39 Pa. 64 (1861); *Hermann* v. *Ramsay*, 5 W. N. C. 188 (S. C. 1878); and *Boothe* v. *Alexander*, 4 W. N. C. 942 (S. C. 1877).

A rough but excellent practical test of the sufficiency of the averments in point of form is expressed in the popular way by the question—supposing the falsity of the facts set out, are the averments sufficiently positive

and explicit to support an indictment of the deponent for perjury?

If the facts are or may be within the defendant's personal knowledge, he should be held to a positive averment; and even when his affidavit is upon information and belief it should be put into the established form, and made as specific and explicit as the nature of the circumstances will reasonably admit. *Loan Association* v. *Brown,* 4 W. N. C. 494 (C. P. 3, 1877).

The use of the phrases "verily believes to be true" and expects to be able to prove "originated in cases, where the defendant was not able from the nature of things, to positively aver essential facts of his own knowledge and are allowable, for the purposes of his affidavit to prevent summary judgment. *Boomer* v. *Henry,* 2 D. R. 357 (C. P. 2, 1893, by Hare, P. J.); *Penn Bank* v. *M'fg. Co.,* 4 D. R. 46 (Blair, 1894).

Where the defence is in the nature of confession and avoidance, affidavit should specify amounts so as to give plaintiff opportunity to admit and take judgment for balance. *Cosgrove* v. *Hammill,* 173 Pa. 207 (1896).

4. If written instruments are referred to in the affidavit they should be set out as exhibits. *Brown* v. *Rogers,* 3 W. N. C. 12 (C. P. 4, 1876); *Hoover* v. *Munyon,* Id. 356 (C. P. 4, 1877); *Richards* v. *Bisler,* Id. 485, (S. C. 1877); *Marsh* v. *Marshall,* 53 Pa. 396 (1886); *Birkey* v. *Whitaker,* 4 W. N. C. 137 (S. C. 1877).

5. The general subject of the sufficiency of the affidavit is too large for present discussion, let us therefore pass over it with the single observation that the affidavit must set out facts sufficient to make a *prima facie* defence to the plaintiff's claim, and that it is sufficient if it does so.

It must, however, meet the case of the plaintiff fairly,

and by a statement of facts, not by a mere general denial. Thus, if defendant means to deny a liability appearing on the copy filed, he must set forth explicitly in his affidavit the facts on which his denial of liability rests, as, *e. g.*, that the signature purporting to be his is a forgery, etc.; merely saying that he signed no such writing, or that the signature is not his, etc., being insufficient, unless the averments are full and broad enough to cover all contingencies, such as signing by another as his agent, or by his request, etc. *Kneedler* v. *Woodruff*, 1 W. N. C. 42 (C. P. 1874); *Ephraim v. Pollock*, 1 W. N. C. 102 (D. C. 1874); *Starr* v. *Phillips*, 1 W. N. C. 471 (C. P. 2, 1875).[86]

A defence good at the time of filing, however, is sufficient to prevent judgment, as, *e. g.*, if the affidavit sets up another suit pending for the same cause of action it is sufficient, and a subsequent discontinuance of such

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[86] In his note (33) on page 57 of "Motions and Rules in Common law" Chief Justice Mitchell humorously comments on the then prevailing practice in the way of allowing defendants to "cobble" their affidavits of defence.

"Perhaps it was this liberality of practice, or the supposed present tendency of the Supreme Court to greater stringency against defendants on affidavits of defence, that produced the act of 18th April, 1874, P. L. 64, allowing writs of error to the *refusal* of a judgment for the insufficiency of the affidavit. For the principles by which the Supreme Court will be guided in such cases, see *Griffith* v. *Sitgreaves*, 2 W. N. C. 707 (s. c. 1876)."

"With the act allowing appeals from preliminary injunctions (24th February, 1866, P. L. 28), that for appeals from decisions on rules to open judgment (4th April, 1877, P. L. 53), and the act above referred to, we shall only need a few more steps in the modern process of getting the cart before the horse, to reach that comfortable state where it shall be the rule to go to the Supreme Court at the outset, and get the law settled in advance, and then come back to the court inappropriately termed of first instance, and find out whether there are any facts in the case to which the law can be applied."

suit will not entitle plaintiff to a judgment for want of a sufficient affidavit in this.

6. The affidavit is conclusive, for the purpose of preventing judgment, upon all the facts properly set out in it, except so far as they are contradicted by the record. Even the original document cannot be looked at to contradict the affidavit, nor can any other paper (*e. g.*, a declaration of no set-off) unless a copy has been filed in accordance with the statute. Some doubt has existed whether the Court is confined to the record of the case itself, or may look into other matters of record in the same or even in other courts, and in *Smith* v. *Hopple*, 3 W. N. C. 27, (C. P. 4, 1876) the Court of Common Pleas No. 4 seems to have looked at the record of another suit to determine whether or not it was pending, though the affidavit averred that it was. In that case, however, the affidavit itself referred to the other suit, and should have set out at least the docket entries, in accordance with the rule that writings referred to must be set out (*ante*, p. 107), and the case was therefore well decided on the insufficiency of the affidavit in merely setting forth deponent's information and belief when the fact was easily capable of positive ascertainment and averment. The same remarks may be made in regard to *Richards* v. *Bisler*, 3 W. N. C. 485 (S. C. 1877). Both cases are, however, upon the border line. The sound and consistent principle is that the affidavit cannot be contradicted or shown to be false except by the record in the very case itself. It may, however, be shown to be false by this record, including the copy filed. *Warner* v. *Smith*, 2 W. N. C. 107 (S. C. 1875); *Furst* v. *Ayres*, 2 W. N. C. 722 (S. C. 1876); *Hill* v. *Gaw*, 4 Pa. 493 (1847).

7. Supplemental affidavits were not allowed in the

early practice, it being thought an unfair advantage, and perhaps an undue inducement to perjury, to tell the defendant what to swear to and then give him an opportunity to bring his conscience up to it. It frequently happens, however, that points arise on the argument which had not been anticipated, and statements which seemed full and explicit to defendant are shown by opposite counsel or the court not to be so to others not having his knowledge of the facts. Whenever it appears probable in such cases that there may be a good defence defectively stated (though not intentionally to delay the cause), the court usually, as a matter of grace, allows a supplemental affidavit, and the practice in this respect, as already said, is exceedingly liberal.

The usual purpose of giving the defendant time to file a supplemental affidavit is of course to remedy defects pointed out in the original, but its office is not confined to that, and defendant may set up an entirely new and different defence. If he does so the court is bound to notice it, but such a course is justly open to suspicion and requires a strict scrutiny of the new defence. *Callen* v. *Lukens*, 7 W. N. C. 28 (S. C. 1879).

By an *allowance* nothing more is meant than that the court will suspend judgment (usually for a week), in order to give time to defendant to prepare his affidavit. A supplemental affidavit may, however, be filed as a matter of right, *without obtaining leave of the court*, at any time before judgment is actually entered. *West* v. *Simmons*, 2 Wh. 261; *Bloomer* v. *Reed*, 22 Pa. 51 (1853).

The court may, of its own motion, order a supplemental affidavit of defence. *Johnson* v. *Fenner*, 1 W. N. C. 472 (C. P. 2, 1875). *E. g.*, where it sees that although inartistically set out defendant has a meritorious defence. *Boetner* v. *Stegmaier*, 3 Kulp. 338 (Luzerne, 1885), but in *Laird* v. *Campbell*, 92 Pa. 470, (1880) it is decided that

a court while it has power to allow or even order the making of a supplemental affidavit of defence it is without power to enforce the order. It is an open question whether our courts, in the earnest desire to execute substantial justice, do not foster carelessness among the bar, by almost invariably allowing defendants a supplemental affidavit, where the first one is such as to entitle plaintiff to judgment for its insufficiency. At the argument on the rule for judgment for want of sufficiency of his affidavit of defence, defendant can see just wherein his affidavit is wanting, and it does not require much coaxing to fetch the average conscience up to making the affidavit necessary to delay the case to a jury trial.

Where time for a supplemental affidavit has been allowed by the court but none has been filed, judgment for insufficiency of the first affidavit *is not of course,* but must be moved for. *Conrad* v. *Rogers*, 3 W. N. C. 157 (C. P. 4, 1876). The case having been partly argued is not transferred by the court clerk to the next list, but may be called up on any regular list on forty-eight hours' notice to the opposite counsel, and the court then reexamine the original affidavit on paper books, as in the first instance. But when the court has not specified the time for filing a supplemental affidavit the delay must not be unreasonable: *Close* v. *Hancock,* 3 Pa. Super. Ct. 207 (1896).

Where a supplemental affidavit has been filed, and plaintiff's counsel deems it still insufficient, the same course is to be pursued of bringing the case up on call. The paper books in such case should contain both the original and the supplemental affidavits.

Just what the scope a supplemental affidavit of defence may take is not susceptible of adequate discussion here, but the Supreme court held in *Callan* v. *Lukens,* 89 Pa. 134 (1879), that it may set out an entirely new or at least a different defence from that set up in the original.

See also *Slag Works* v. *Krause*, 5 Pa. Super. Court, 622 (1897). An important effect of a supplemental affidavit of defence is, that if it be filed after issue joined, plaintiff may not take a rule for judgment for its insufficiency. *Hoke* v. *Martin*, 7 York, Leg. Record, 65 (York, 1893).

As has been stated, if plaintiff has properly served his copy of statement and rule to file affidavit of defence sixteen days after—or rather fifteen entire days having elapsed—he may on motion in the prothonotary's office take judgment by default. But in cases where no affidavit of defence is required—*e. g.*, suit on official bonds—if an affidavit be filed judgment cannot be had for want of its sufficiency. *Bartoe* v. *Guckert*, 158 Pa. 124 (1893).

X.

Rules for judgment for want of an affidavit or sufficient affidavit of defence.

And this leads us to a necessarily brief discussion of the rule to show cause why judgment should not be entered against defendant for want of a sufficient affidavit of defence.

This rule occupies more space in the lists, is more important in its results and raises more questions of law for argument than any other rule in our present practice. But it is not feasible in this work to do more than to touch, in a general way upon the leading points of practice in regard to it, especially such as are not easily accessible in the books at the present time.

I.

Judgments for want of an affidavit of defence origi nated in an agreement of the Philadelphia Bar entered into on September 11th, 1795. (See note, which contains a copy of the document itself, by Judge Carr to the report of the cases of *Detmold et. al.* v. *Gate Vein Coal Co.* and *Same* v. *Fisher,* 3 W. N. C. 567 (U. S. D. C. E. D. of Pa. 1876). They were soon after authorized by the rules of the Philadelphia County courts and subsequently having received legislative sanction in the acts relating to the District Court, eventually became uni-

versal throughout the commonwealth. In the early stages of the growth of the practice there was much diversity of opinion in the Supreme Court arising, of course, from the fact that many of the Justices of that Court were not accustomed to the practice, but even though there was much reluctance to adopt it on the part of some of the members of the court, the general trenced of sentiment was favorable to it. Take as an instance the final paragraph in Mr. Justice Gordon's opinion in the case of *Bardsley* v. *Delp*, 88 Pa. 420 (1879), (a writ of error to the Court of Common Pleas No. 1 of Philadelphia) which reads: "If, indeed, the defendant, by this ambiguous wording meant that the plaintiff had taken it as collateral security for a pre-existing debt, he should have said so. If he has not been able to make out a *prima facie* case for himself, we cannot help him by inferences drawn from obscure language which he by a word or two might have made plain. If a defendant, when he has the stand to himself, cannot make out a case in his own favor, it must be because he has none, and he ought not to ask a court to patch up a case for him."

This embodies the true rule upon which the courts have settled. The difference between skilful evasion and mere inadvertence or failure to foresee the precise point of objection, is not always easy to determine, but it is always less difficult in the court of first instance which has the materials before it in a plastic state, than afterwards when they have hardened into judgment, and are brought forward as an exhibit in print. There is seldom an instance where counsel, who is met with a really unexpected objection to his affidavit, and has been willing to state that he is un-instructed, or even that he has reason to believe that he can remedy the defect, has been refused an opportunity of doing so by a supplemental affidavit. Where, therefore, the defendant has had a

second opportunity, with the deficiency pointed out to him, and fails to make a satisfactory defence, we may well conclude in the words of Justice Gordon, that "it must be because he has none;" and in the present practice of this country, where no leave for a supplemental affidavit has been granted, it may safely be assumed that it was because counsel have not been willing to say that they could essentially fortify the affidavit already filed.[86]

Plaintiff must avail himself of his right to this rule promptly and before he takes any step in the case otherwise he will be taken to have waived his rights. *O'Neal* v. *Rupp*, 22 Pa. 395 (1853). But unless the statement of claim is complete, accurate and precise, judgment will not be rendered for the insufficiency of the affidavit of defence, if for example the action is in *quantum meruit* and there is no averment that the price sued for is fair, or usual or that the value of the services for which recovery is sought is of the ordinary standard, the case must go to the jury: *Murphy* v. *Taylor*, 173 Pa. 317 (1896): see also the opinion of Mr. Chief Justice Sterrett in *Byrne* v. *Hayden*, 124 Pa. 171 (1889).

XI.

Rule for judgment for part of claim.

The Act of May 31, 1893, P. L. 185, permits plaintiff "to take judgment" for the part of his claim to which defendant has not filed an affidavit of defence, the act does not specify how the part judgment shall be taken. In this county the practice is to take a rule to show cause why judgment should not be entered for Plaintiff for the amount admitted to be due. It is the practice elsewhere to take the judgment in the Prothonotary's office.

The Act has been held to apply only to cases where the defendants specifically admits a certain amount due, or at all events makes such admission that the amount can be readily liquidated, irrespective of contents as to particular items of an account which are in dispute. *Densem et al.* v. *Keily*, 3 D. R. 339 (C. P. 2, 1894); *Scranton* v. *Hall*, 3 Lack. L. N. 99 (1896). Under this Act plaintiff may have judgment upon that part of an affidavit of defence which is insufficient, and proceed as to that part of his claim to which it is adequate to prevent judgment. *Coborn* v. *Reynolds*, 14 Pa. C. C. 157 (Warren, 1894). But it is doubtful whether Plaintiff could prevail in a rule to withdraw from his statement a part of his claim, without prejudice to proceed for the balance. *Hill* v. *Ritter*, 9 W. N. C. 574 (C. P. 3, 1880). Unless the statement consists of severable claims. *Richards* v. *Bisler*, 3 W. N. C. 485 (S. C. 1877).

XII.

Rules to open or to strike off judgment.

The rule to open judgment and let defendant into a defence is peculiar to Pennsylvania practice, and is a clear example of our system of administering equity under common-law forms.

By long practice and common understanding it is confined to judgments by default, and those entered on warrants of attorney to confess, etc. It was, however, invented in the absence of a court of chancery, as a substitute for a bill in equity to enjoin proceedings at law, and in *Cochran* v. *Eldridge*, 49 Pa. 365 (1865) (in which a judgment upon an award of arbitrators, in an adverse proceeding, was opened), Chief Justice Woodward, recapitulating the famous contest between Coke and Lord Ellesmere, asserted in explicit terms the right of the courts of Pennsylvania to exercise in this form all the powers of a court of chancery to relieve against judgments obtained by fraud. And see *Dorney* v. *Mertz*, 8 Phila. 553 (C. P. Lehigh Co. 1871). Notwithstanding this decision, however, it has not been usual to exercise equitable jurisdiction in this form, except as already stated over judgments by default, or by confession on warrant of attorney, and it is not likely that a more extended practice would be encouraged since the grant of equity powers, which are ample and afford some facilities for the protection of the rights of parties which the common-law procedure does not, and especially since it has been held that an application to the court to open a judgment

is not a bar to a subsequent bill in equity for the same relief. *Wistar* v. *McManes*, 54 Pa. 327 (1867).[87]

When the application is addressed to the equitable power of the Court to permit a defence to a judgment regular on its face, the proper remedy is to open. *Miller* v. *Glass Works*, 172 Pa. 70, (1895)) but as this admits the validity of the judgment and if this is to be attacked the rule should be to vacate or set aside the judgment. *Huber* v. *Grossman*, 14 W. N. C. 157 (C. P. 1, 1883). It seems that the Common Pleas has no power to open a judgment entered on the transcript of a Magistrate, but may stay execution of it. *Singer* v. *Singer Co.*, 2 Pa. C. C. 578 (Carbon, 1886).

A judgment entered on a verdict after a trial or upon a hearing, *e. g.*, for want of a sufficient affidavit of defence, cannot be opened after the term at which it is entered. *Hill* v. *Egan*, 2 Pa. Super. Ct. 596 (1896). But there is no limit of time within which a judgment by default can be opened, except, that here as well as in other cases of equitable relief delay amounting to *laches* will bar the party applying. *Vanline* v. *Finney*, 1 W. N. C. 8 (D. C. 1875); *Citizen's Trust Co.* v. *Goodchild*, 195 Pa. 80 (1900).

There is no authority for opening a judgment of *nonsuit; Liebrecht* v. *Insurance Co.*, 1 W. N. C. 84 (Phila. 1875). It must be remembered that when the rule is allowed or if it be made absolute that the court will make

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[87] The opening or refusing to open a judgment being matter of discretion, has been held not to be reviewable on writ of error (except in cases of excess of authority; *Huston* v. *Mitchell*, 14 S. & R. 310; *Catlin* v. *Robinson*, 2 Watts, 373), but now by the act of 4th April, 1877 the unsuccessful party may appeal. The effect of this statutory extension of the remedy by rule, on the question of barring a subsequent bill in equity for the same matter, and consequently on the practice, cannot, perhaps, be safely predicted.

some order in protection of intervening rights; *Kalbach* v. *Fisher,* 1 Rawle, 323. Indeed the rights of third parties will be considered in disposing of a rule to open judgment; *Vanderpoel* v. *Vanderpoel,* 162 Pa. 394 (1894).

The rule may be made absolute on terms, and where execution has been issued, it is usual for the court to make some order respecting it. Unless so ordered, the rule does not of itself stay proceedings; *Spang* v. *Commonwealth,* 2 J. 358 (1850).

The grounds upon which the rule is founded are, of course, as varied as those of bills in equity, and as in equity, each case must stand upon its own peculiar merits. A discussion of even the principal and most frequently-occurring cases would extend this treatise far beyond its limits, and they must be passed by with the remark, that in general the application is based on fraud, imposition, or mistake, in the execution of the instrument on which judgment is entered; failure of the consideration for which such instrument was given; wrongful use of the judgment where it was intended for security only; and in cases of judgments by default, accident, ignorance, or other unavoidable cause by which a meritorious defence has failed to be presented in proper time. The rules which, next to those just discussed, occupy the most space in the lists and whose importance therefore require some special, though necessarily brief mention, are those to open and strike off, or, as it is sometimes expressed, to set aside or vacate, judgment.

I.

Rules to open or to strike off judgment.

1. These two rules are usually treated together, and indeed they are used and spoken of in the reported decisions interchangeably, with hopeless confusion. But there is a wide and fundamental difference between them, which is thus tersely and authoritatively expressed in a very recent case by Chief Justice Sharswood: "A motion to set aside or strike off a judgment must be on the ground of irregularity appearing on the face of the record; a motion to open it is an appeal to the equitable power of the court to let the defendant into a defence." *O'Hara* v. *Baum*, 82 Pa. 416 (1876).

2. This distinction had previously been pointed out more or less clearly (especially by the same learned judge while President of the District Court. *Devereux* v. *Roper*, 1 Tr. & Haly, 662 n.; and by Judge Hare in the same court; *De Crano* v. *Musselman*, 7 Phila. 211 (D. C. 1870); and see *Horner* v. *Horner*, 39 Pa. 126 (1861); *Humphreys* v. *Rawn*, 8 W. 78); but, as already said, the cases have treated the two rules as if they were the same. A notable instance is to be found in *Knox* v. *Flack*, 22 Pa. 337 (1853), where the Supreme Court reversed a perfectly regular judgment because the court below had discharged a rule to strike it off on the ground of defendant's infancy when the bond and warrant were executed, a fact which was not on the record, and could not be got on it, except, as stated by Lowrie, J., in the opinion, that it was *admitted in the paper book*. The same judge, in *Banning* v. *Taylor*, 24 Pa. 295 (1854), (a case on the border line), delivered a dissenting opin-

ion, in which the true principles are clearly and most forcibly stated, and yet in *Hutchinson* v. *Ledlie,* 36 Pa. 113 (1860), he summarily took it all back, and referred to the opinion from which he had dissented, as showing "convincingly" that courts have power to set aside judgments "for causes appearing on the record, and also for causes that may be made to appear by evidence." In that case, however, judgment had been entered on a bond and warrant given in the firm name by one partner only. The irregularity, therefore, appeared on the record, and the case was rightly decided. It is referred to only to show the confusion in the language used by an eminent judge to whom the true principles were undoubtedly familiar. In *Knox* v. *Flack* the fact of infancy was undisputed, and the judgment was therefore void, and the difference in the form by which it was got rid of, whether summarily struck off by the court, or opened and a verdict rendered for defendant, was practically unimportant, and the distinction was not present in the mind of the court when expressing its decision. The same may be said of *Martin* v. *Rex,* 6 S. & R. 296, where a judgment was struck off because the warrant on which it was entered had previously been exhausted by the entry of judgment on it in another county; of *Gordon* v. *Bartley,* 4 W. N. C. 37 (C. P. 1, 1877), where it was admitted that defendant was dead at the time of entry of judgment; and perhaps of other cases that appear to be in contravention of the rule. Had the facts in any of these cases been disputed, the form of the rule would have become material, and there is no doubt the courts would have observed the proper distinctions.

Whether or not, however, all the cases can be reconciled with it, the rule as stated by Chief Justice Sharswood in *O'Hara* v. *Baum,* above quoted, is the true and settled rule, and will always be enforced when the attention of the court is directed to it.

II.

To strike off.

3. The rule to strike off judgment is essentially a common-law proceeding, a short and summary substitute for an *audita querela*, a writ of error *coram robis*, or a *certiorari* or writ of error from a superior court, by which the same relief was formerly administered. It cannot be combined with an order to open the judgment. *Reynolds* v. *Supreme Conclave*, 9 D. R. 622 (Lancaster, 1900).

4. Being for irregularity apparent on the face of the proceedings, it is in the nature of a demurrer to the record, and is not confined to any particular kind of judgments, nor limited as to the time it may be taken advantage of, nor affected by matters *dehors* the record, except so far as defendant may have put himself in position to be estopped from making the objection. Examples of its appropriate use may be found in *Scott* v. *Wilmer*, 1 W. N. C. 41 (D. C. 1874); *Scott* v. *Loughery*, 6 W. N. C. 123 (C. P. 1, 1878), and *Stadelman* v. *Penna. Co.*, Id. 134, where judgments had been improvidently entered for want of affidavits of defence, in cases not within the law; in *Tobias* v. *Dorsey*, 2 W. N. C. 15 (C. P. 2, 1875), where the record showed on plaintiff's suggestion, that defendant was dead at the time judgment was entered; and in *Rothenhausler* v. *Rothenhausler*, 6 W. N. C. 560 (C. P. 2, 1879), where the record showed a judgment entered by default while an order staying proceedings was still in force.

It is to be noted that the reversal of an order of the Common Pleas striking off a judgment is not *res adjudicata* as to subsequent proceedings in the lower court to open the judgment and let the defendant into a de-

fence on the merits ; *American Mfg. Co.* v. *Smith Co.*, 28 Pa. Super. Ct. 124 (1905).

5. As already said, this rule occupies a very large portion of the time of the courts on motion days. "Final judgments," says Blackstone, "are such as *at once put an end to the action* by declaring that the plaintiff has either entitled himself or has not, to recover the remedy he sues for." Doubtless if the learned commentator were to spend a few Motion or Argument list days in our courts, he would be apt to think that by some strange perversion, judgments had come to be only the beginning of most actions. The practice of this county in this respect is extremely liberal, not to say loose, and has been frequently expressed as rule absolute whenever the defendant makes out a fair conflict of evidence for a jury. This rule, eminently proper for cases of default, promptly and fully excused, has, been pushed to such extent in other cases, especially since the acts allowing parties to testify, as to have become a positive abuse. A defendant who has only enough evidence to produce a fair conflict, ought not to prevail against a plaintiff who has also evidence amounting to a fair conflict *plus* the written instrument. The tendency of Pennsylvania law to reduce the rank of written evidence by allowing it to be freely contradicted (a tendency perhaps unavoidable in the absence of a court of chancery), is in danger of running wild, and should be stayed. The reason for its introduction no longer exists, and since parties have been made witnesses, its dangers have been increased many fold. The true rule, to which the courts must ultimately come, is that the defendant should show such a predonderance of evidence that a jury ought, and probably would, find in his favor. See the opinion of Dana, J., in *Philbin* v. *Davinger*, 29 Leg. Int. 325, and that of Meyers, P. J., in *Wilson* v. *Leinbach*, 6

6 W. N. C. 483 (Northampton, 1879); *Early's Appeal* and *Hockernell* v. *Fleckenger*, 7 W. N. C. 515 (S. C. 1879); *Knarr* v. *Elgren*, 19 W. N. C. 531 (S. C. 1887); *Jenkintown Bank* v. *Fulmer*, 124 Pa. 337 (1889).

It hardly need to be said that in the striking off a judgment only defendant can have the rule, and in opening while this is not always so, yet the petition for the rule must be very specific in the allegations of interest of the party asking for the rule or, rather, as it is said in *Creighton* v. *Scranton M'f'g Co.*, 191 Pa. 231 (1899) "the averments * * * must establish a *prima facie* case for the relief asked:" see also, *Cutler* v. *Magraw*, 10 D. R. 146 (Crawford, 1900). A mortagee or a plaintiff in execution who purchases the land levied on and sold under their judgments having purchased the same at the sheriff's sale at a price less than that which satisfy their claims, may attack any judgment undischarged by the sale if the defence set forth in the petition for the rule to open a judgment and to intervene is meritorious. And note that, even as to a judgment entered by default on a record faulty on the face the rule of a stranger must be to open and to intervene. Although junior judgment creditors have no standing to have a judgment opened of prior lien to them, *Forbes* v. *Adams*, 17 Phila. 222 (C. P. 3, 1885); an allegation of fraud in the petition for the rule will cause the court at least to entertain the application; *Campbell* v. *Kent*, 3 P. & W. 72; *Lewis* v. *Rogers*, 16 Pa. 18 (1851); *Clark* v. *Douglas*, 62 Pa. 408 (1869). A rule to open will not be granted when the gist of the defence is the statute of limitations; *Woods* v. *Irwin*, 141 Pa. 278 (1891), the application being to the equitable power of the court it must show a meritorious claim not a technical defence especially so if the defendant has had his opportunity to offer that defence.

The most numerous instances of the rules will be

found in judgments entered by virtue of warrant of attorney and it may be said, that the courts are well disposed towards applications in these cases; the defence to such judgments nearly always bear the features of injury done. In *Muller* v. *Schenck*, 94 Pa. 37 (1880), a judgment was entered by virtue of a warrant of attorney attached to a promissory note, known as a "judgment note," to stay an impending execution defendant executed and delivered plaintiff's other notes of similar form, upon which judgment was entered; defendant sought relief from the later judgments on the ground of fraud in the first, but his rules could not be made absolute because, by giving them he was estopped from defending against the first. His right course would have been to ask for a rule to open the first judgment to make the defence and for a stay of, or to set aside the pending *fieri facias*.

A judgment confessed on a warrant of attorney incorporated in a form of lease which stipulates that the lessee will not apply for an opening of a judgment if entered, cannot be opened at the instance of a sub-tenant, because he is bound by the covenants of his lessor in the lease under which he claims; *Guenther* v. *Gilchrist*, 28 Pa. Super. Ct. 232 (1905). It is a matter of importance that the rule taken should be appropriate in form to secure the relief asked. A rule involving a defence on the merits should be to open, *not* to strike off and yet, in a recent case a judgment was entered on a warrant to confess, to which the defence was, that an essential condition of the right to exercise the warrant was unfulfilled, a condition which could not possibly appear on the face of the record and, even if it did, was in no sense a legal irregularity, we find this essential difference overlooked by the lower court and waived by the appellate tribunal both of which decided the case on its merits, rightly as far as the result was concerned, for the rule was dis-

charged; *Singer* v. *Sheriff et. al.*, 28 Pa. Super. Ct. 305 (1905).

The validity of a judgment may not be assailed on a rule to stay a *fieri facias* unless the prayer to open be a part of the rule. *Anderson* v. *Wordsworth*, 1 Lack. L. N. 264.

A rule to open judgment may be made absolute as to part and discharged as to part. *Ansley* v. *Arnt*, 3 Kulp, 152 (Luz. 1884).

As to the time within which a rule to open should be asked, it seems that there is no lapse of time to the exercise of the power of the court over judgments entered by default or confession. *King* v. *Brooks*, 72 Pa. 363 (1872).

XIII.

Rules relating to Mechanics' Liens and Municipal Claims.

1. Mechanics' Liens and Municipal claims are established in our system of jurisprudence by what may fitly be called artificial and unnecessary legislation. With regard to the former the report of the Committee on Law Reform of the Bar Association, (Fifth Annual report of the Pennsylvania Bar Association p. 27) gives as the judgment of the Committee that the ends of justice would best be served by a repeal of all laws relating to Mechanics' Liens. The legislation in respect to Mechanics' Liens at present is a development of the Common Law right of an artisan or mechanic to a lien on his work for compensation, this right existed in all kinds of handicraft and was enforced by possession or if this which were delivered to him at whose instance it was fashioned before payment, an action of *trover* would lie for its return as well as debt to recover its value. Probably because in most instances the articles made were for use in the construction of dwellings or places where business was conducted, and were furnished in their construction, that the lien followed the article into its place. Thus the lien was extended to the whole building, and was given a tangible form in the way of recording or filing it in the court office and the law was formulated so that we find tradesmen whose calling was in furnishing items in the sum of building are protected, while none others, not even those who work up the raw material that goes into such constructions are. The exact reason for

this favoritism is difficult to see, the more so, because in the course of trade development, we find corporations, and limited partnerships, having for their object the manufacture of house building material enjoying the fruit of the application of a principle established and pursued for the benefit of individual mechanics dependent on their hands for their daily life.

2. It does not require extended argument to prove the righteousness of the opinion of the Pennsylvania Bar Association as to the advisability of repealing Mechanic's Lien laws. It is a species of class legislation and might be reasonably attacked on that ground, but having run the gamut of nearly a hundred years we must acquiesce in the judgment of the Law Reform Committee that it has "come to stay." But it is not too much to hope that the century of experience with this most particular of "special Legislation"—some sixty acts of assembly being found necessary to give the principle potency—may not far off lead to its being legislated to the "scrap basket."

3. It may, moreover give us some difficulty to explain why this legislation does not come under the constitutional inhibition, expressed in Article III, sec. 7, particularly since Judge Sulzberger's convincing opinion in *Tennessee Producers Marble Co.* v. *Grant et al.*, 14 D. R. 453 (C. P. 2, 1905), where he held that the section 28 of the Act of June 4, 1901, (Mechanic's Liens) was unconstitutional as an attempt by special legislation to provide and change "the method of collecting debts."

The whole statute would seem to be open to the same criticism. It offers opportunity for merriment to observe that the same protection which was afforded by the common law to the hard working blacksmith or stonecutter for the return of his labor, has been extended by intricate confusing legislation and decisions to incorporated manufacturers and "prosperous" partnerships,

the blacksmith and stonecutter, and all other trade followers being to all intents and purposes, left to play with the shell of the right once their own.

4. Legislation establishing Mechanic's Liens in our jurisprudence began with the act of April 16, 1803, P. L. 591, but the basic law, at least so far as the practice is concerned, is the Act of June 16, 1836, P. L. 695. Chief Justice Gibson's opinions in *McIntyre* v. *Warner*, 2 W. & S. 392 (1841) (the first case in the books which treats of the subject) is interestingly instructive.

The last legislation is the Act of June 4, 1901, P. L. 431, which was suggested by the Pennsylvania Bar Association at its Annual meeting in 1899; (*Vol.* v. *Annual Reports of Pa. Bar. Asso.*,) and passed somewhat as formulated by the committee of Law Reform of that body. It is a codification of the laws under which our practice in this branch of the profession has developed and if it has done no other good it has repealed all of the heterogeneous and conflicting laws which were in force up to the time of its approval.

5. Rules arising from this class of cases are for the most part directed against some technical informality or failure to conform to the requirements for being purely statutory compliance with statutory requirements is necessary to give it validity; *Knelly* v. *Howarth*, 208 Pa. 487, (1904) : but in taking such rules, which may be done at "any time," scan sec. 59 of the act, sec. of Act of June 4, 1901, P. L. 431, sec. 59 (Mechanic's Liens).

6. A lien is defective on its face when it fails to particularly set out the contract under which it claims, and quantity of articles or materials furnish. *Howard* v. *Allison*, 12 D. R. 117 (Venango, 1902). This defect is doubtless curable by amendment but where the notice by a subcontractor to the owner is not filed within three months after the work is done or the last of the materials furnished by him which he contracted to furnish the

chief contractor for the work the lien is fatally bad. *Storer* v. *Folz*, 13 D. R. 636 (Franklin, 1904); *Wolf Co.* v. *P. R. R. Co.*: *Collins* v. *Same*, Ibid. 791 (C. P. 1, 1904). For the failure to give proper preliminary notice cannot be amended; *Thirsk* v. *Evans*, 211 Pa. 239; see also *Lofink* v. *Schuette*, 14 D. R. 558 (C. P. Allegh. 1905). A claim is also fatally bad when the extent of the estate against which it is filed is not stated as required by section 11 of the act; *Maddocks* v. *McGann*, 12 D. R. 701 (Lackawanna, 1902). The lien is bad, if when the contract is not with the owner or not for an agreed sum a copy of correspondence developing the contract is substituted for the "detailed statement of the kind and character of the labor or materials furnished" as required by the same section paragraph 6; *King* v. *Church*, 14 D. R. 265 (C. P. 3, 1905). The notice required by section 21 to be given by a contractor to the owner after he has filed a lien, applies to a subcontractor and the claim is bad without this appearing; *Compton* v. *Sankey*, 13 D. R. 535 (Dauphin, 1903). In the matter of amendments allowed by section 51, it may be broadly stated the amendments contemplated by the section are those as to form of the lien, and they may be had even after the time within which a lien may be filed has expired; *Hoover* v. *Lebo*, 14 D. R. 238 (Clearfield, 1905); appeals may be taken from the action of the court upon rules to show cause why a lien should not be stricken off if the order or judgment be definitive or final but a rule "to show cause why an attorney should not enter an appearance and strike off" (*sic.*) a mechanic's lien is not "a definite judgment or decree" from which an appeal will lie; *Kurrie* v. *Cottingham*, 209 Pa. 12 (1904). All the instances mentioned are subjects of rules to show cause why the lien should not be struck off and are of course, and even if judgment by default be entered on the lien the rule would still be of

course, but should take the form of "to show cause why the judgment entered should not be vacated and the *scire facias*," where one has issued, upon which judgment has been entered quashed. After judgment has been entered upon a *scire facias sur claim* if defendant—or a terretenant has a defence on the merits. As for example to the character of the work, cost, etc., an *allocatur* must be sought and the rule be to open the judgment.

7. The test of the strength of rules of this kind is, is the reason of the rule such as would constitute a valid defence to a *scire facias* which if established by proof, either by inspection of the record or by verdict, would entitle defendant to final judgment. As a general rule, no objection to the *scire facias sur claim* can be made by way of defence to a *scire facias in revival* of a judgment entered thereon, but if the defence is to the legality of the *scire facias sur claim* itself and is raised by a party of right the court will entertain it.

II.

Municipal Claims.

1. In respect of Municipal Claims as little can be said in justification of the legislation which has been perpetrated in their interest as in Mechanic's Liens; perhaps indeed not as much for a municipal claim arises from the inherent right of government to tax the owner of the ground subject to the lien, and to enforce payment from all citizens. The basis of taxation of course is naturally land, and for the support of the local municipality the *ratio* of taxation is established by the value of the taxable real property which must also in every case of improvement be the measure of the proportion he must pay as his share. The right to assess and the duty to pay can be easily established, the tax is fixed and remains so

until it is paid, needless then the more than fifty laws passed on the subject since the Act of March 28, 1814. See Law 223. All of which are responsible for the conflicts of decision, on the subject so forcefully set out in the report of the Committee of Law Reform at the Annual Meeting of the Pennsylvania Bar Association of 1900. See Vol. VI. of Proceedings of Penna. Bar Association, page 21.

But it is not the province of this book to proceed the discussion on these lines as are developed in the legislation and it is to the practice under it we must confine ourselves, so that, with expressing the belief that a far less complicated system of enforcing municipal claims of all kinds could be, and ought to be, adopted we proceed to the discussion of the rules which pratice has developed.

2. Rules relating to municipal claims are of two classes those which attack the validity of the claim for irregularity in the lien itself apparent on the face of the record and are available at any stage of the proceedings, and those which are directed against the lien on account of error in the claim not apparent on the face of the record, *e. g.*, misdescription of the property, naming as defendant one who is not the registered owner of the property when either the lien is filed or at the time the *scire facias* issues, in the two last named instances the rule is not of course, but must be allowed upon a petition verified by oath which must precisely state the petitioner's whole case. All instances of irregularity in the claim, misdescription or giving the wrong person as defendant are of course available by affidavit of defence, but practically, one who is not interested in the land is not apt to trouble himself to make an affidavit of defence particularly as a judgment by default is not *in personam*. Therefore, it behooves an actual and registered owner to move to be admitted to the record to take the rule neces-

sary to free his land from the cloud of an imperfect lien or a wrongful judgment.

3. A good example of what is such irregularity on the face of the record as will permit a rule to show cause why the claim shall not be struck off is found in the case of *Connellsville* v. *Gilmore*, 15 W. N. C. 343 (S. C. 1884). The lien was filed for the expense to the Borough in removing an obstruction in the highway upon which defendant's property abutted, the defence was that the claim did not contain an averment of service of notice on defendant to remove the obstruction. The court below made absolute the rule and the Supreme Court affirmed. The opinion was by the late Chief Justice Paxson who, after calling attention to the fact that the amount involved in the case was $4.44, remarks: "The maxim *de minimis non curat lex* does not appear to prevail in this State." This same rule was available in *Phila.* v. *Hanbest,* 15 W. N. C. 349 (C. P. 4, 1884; where no averment was made in the claim that the preliminary notice to the owner of the land to do the curbing, to recover the cost of which the lien was filed. To cite examples of what irregularities on the face of the record will result in the summary removal of the lien from the index and the numerous authorities therefore would extend the discussion to the limits of weariness, so it is sufficient to say broadly that any failure to comply with the mandates of the law then in force at the time the right to file the claim accrued and under which it was filed either in form or as to time of procedure is death to the claim by a rule to strike off. The entry of judgment on the *scire facias* or even after revivals of the same, a rule to strike off will prevail. A defence to the form of or failure in some essential statutory requirement is never too late where the party claiming protection of the statute never had opportunity to present it; *City* v. *Nell*, 25 Pa. Super. Ct. 347 (1904). And indeed it may be stated that even the

apparent neglect of a land owner in sleeping on his rights and penalty the claim to get to judgment will not give it force for as Judge Arnold remarked in *Phila.* v. *Hanbest,* (*supra*). "A valid judgment can never be entered on the claim." But there is an exception to this proposition, if a claim be good as to part but bad as to part, and defendant has had his day in court without making his defence so that a default judgment is entered, a rule to strike off the judgment—a very questionable rule in such a case, at any rate—will be discharged *because* the judgment is the sum of all the items of the claim some of which were good; *Phila.* v. *Wallace,* 7 D. R. 721 (C. P. 1, 1898).

4. Failure to issue or prosecute to judgment a *scire facias* within five years (prior to the Act of 1897) are other examples of fatal faults in the record. *Phila.* v. *Reeder,* 13 D. R. 614 (C. P. 2, 1904). As an example of the rigor with which this principle maintains look at *Hunter* v. *Lanning,* 72 Pa. 25 (1872), there the omission was actually induced by defendants attacking the claim and yet the claim was held invalid because it was not reduced to judgment within five years from filing. Where the *scire facias sur* claim has issued too late a judgment entered thereon is wholly void and would not sustain a valid execution. The proper rule is to show cause why the *scire facias* should not be quashed, judgment vacated and all subsequent proceedings set aside.

Cases in the line of *Simons* v. *Kern,* 92 Pa. 455; *Phila.* v. *Cooper,* 212 Pa. 306, imperfect execution of the *scire facias;* of *Phila.* v. *Hiester,* 142 Pa. 39, issuance of *scire facias* after the lien of the claim had expired; may be added to the foregoing as types of the prevailing ones under the authority of which rules are taken.

5. A further function of rules in general, is applied in Municipal Claims, where interpretations of the meaning of a statute is obtained; an example of this is found in

Phila. v. *Sciple,* 12 D. R. 582 (C. P. 2, 1903). The Act of July 26, 1897, P. L. 420, while requiring a scire facias "to revive and continue" the claim to issue within every five years of the duration of the lien exempts the thitherto essential under the Act of April 16, 1840, P. L. 410, of entering a judgment on the revival, the mere issue of the scire facias being sufficient. To the *scire facias sur claim* defendant filed an affidavit of defence which the plaintiff did not attack nor took any further steps until within the five years there current where a *scire facias* to revive the claim, as provided by the statute went out. Defendant took a rule to show cause why this writ should not be quashed on the ground that he had offered his defence to the claim. The court made the rule absolute, holding (Wiltbank J.) that the act contemplated only undefended claims and that where an affidavit of defence has been made to a *scire facias* it must be disposed of before another writ can be obtained.

6. In rules in Municipal, and for that matter, Mechanic's Liens also, it must be remembered that while this class of claims are dependent for their validity upon their adherence to the requirements of the statutes which give them standing yet this very condition appeals to the equitable sense of the courts, and the petitioner for the rule had better be equipped with some meritorious defence if he hopes to get rid of an obnoxious claim on a mere technicality.

The importance of strictly observing the statutory requirements in pursuing a municipal claim will be recognized when it is remembered that unless this be done the judgment will not sustain execution and the purchasers at a sheriff's sale under a *levari facias* on the judgment will take no title; *Simon* v. *Kern,* 92 Pa. 455. There is neither space nor occasion to comment at large on the difference between such error in the proceedings as is cured by judgment and such a judgment will not rem-

edy, but in general it may be stated to be the law, that the mandates of the act which gives the right to lien for the claim which relate to proceedure, such as notice to the proper party and service of writs must be followed without any deviation, to preserve a title giving power to the judgment on the claim. But this only if there has been no neglect of the defendant in the performance of his part under laws to which he as a property owner is subject. Laches will prevent the prevailing of an otherwise good defence: *Phila.* v. *Unknown*, 20 Pa. Super. Ct. 203 (1902); but it is a question whether a too much belated attack upon a municipal claim validates the judgment on the claim to the extent of sustaining an execution sufficient to give good title.

XIV.

Rule to set aside sheriff's sale.

A few words on the rule to set aside a sheriff's sale must conclude our subject.

1. Notice of this rule must be given to all the parties interested, that is to plaintiff, defendant, sheriff, and *purchaser*. This last is frequently overlooked, but is essential, as by his bid the purchaser has acquired an inchoate title, of which he cannot be divested without opportunity to be heard.

2. It was the settled practice, established in the District Court and followed by the present Courts of Common Pleas, though not made a rule of court, that on the hearing of a rule to set aside a sheriff's sale for irregularity in posting bills, etc., the deposition of the sheriff's billposter is a *necessary part of the testimony*. The evidence on the point of omission to post, etc., is not only commonly interested, but is almost always merely negative, and experience has shown how often it is unreliable. The testimony of the billposter, therefore, as that of the person whose duty it is to be informed on the question, and as in most cases the only affirmative evidence attainable, must always be taken, not as necessarily conclusive, but as an indispensable part of the evidence to which the court is entitled.

3. Another point of practice, under this rule, in connection with the rule to set aside execution which is commonly joined with it, also settled and regarded as equivalent to a rule of court, is that after the sheriff's advertisement has begun, or any of the expenses of the execution incurred, *no stay of proceedings* shall be granted with the rule until after the sale. Where the cause alleged is such that the judge allowing the rule can see from the record that the record is fatally irregular this practice is occasionally departed from, but only in very clear cases. The reason of the rule is obvious; the expenses of advertisement are usually considerable, and after they have been partly incurred it is better that they should go on to completion, for if the rule is discharged then the expenditure has not been lost, and the plaintiff has not been delayed; while if the rule is made absolute, the whole matter, being inchoate until delivery of the sheriff's deed, remains under the control of the court. After the sale, however, the acknowledgment of the sheriff's deed will always be stayed pending the hearing of the rule.

4. The rule to set aside a sheriff's sale should be applied for promptly; *Young* v. *Wall*, 1 Phila. 69 (D. C. 1850); but it may, and where the delay is properly accounted for, will be granted at any time before delivery of the sheriff's deed. Some conveyancers hold that the acknowledgment of the sheriff's deed is tantamount to a delivery, especially as under the practice in this county the registering and recording of the deed are done for the vendee out of which incidents are clearly constructively the act of the vendee, and he does not receive his deed until after it has been registered and recorded. Perhaps it comes from this, that there has always been reluctance on the part of the court to give the rule *after* acknowledgment. It is true that sheriff's deed poll like

an indenture deed between parties is effective only from delivery, but the question is what constitutes delivery? After the purchaser's title has vested it cannot be taken from him by the summary process of a rule, it must be if at all by a bill in equity, or an action of ejectment. *Carr* v. *O'Neill,* 1 W. N. C. 41 (D. C. 1874); *Wrode* v. *Bancroft,* Ibid. 374 (C. P. 1875); *Stephens* v. *Stephens,* 1 Phila. 108 (D. C. Allegh., 1850); *Vauerman* v. *Cooper,* 9 Penna. L. J. 265; *Evans* v. *Maury,* 17 W. N. C. 377 (S. C. 1886).

Nor should there be any delay in performing the conditions if any are imposed by the court in granting the rule; *Association* v. *Adams,* 1 W. N. C. 160 (C. P. 4, 1875).

5. The grounds for setting aside sheriff's sales are many but an examination of the reported cases in the Weekly Notes of Cases, and other Common Pleas Reports; will lead to grouping them under two heads; where there is any statement or mistake in the advertisement of the sale which would tend to impair the value of the property and where there has been a mistake in the process of the writ of execution.

Of course, fraud and collusion between plaintiff and purchaser, or defendant and purchaser will operate as reasons for granting and making absolute a rule to set aside a sale. *E. g.,* such action between the interested parties so that bidders were deterred. *Conrad* v. *Edwards,* 7 Pa. C. C. 342 (Chester, 1892); *United Security Co.* v. *Safford,* 3 Lack. L. N. 51 (Lack. 1897).

As to causes coming under the head of errors in advertisement, it must be remembered that the mistake complained of is in the "hand bills" of the sale. An error occuring in a newspaper advertisement not found in the hand bill is not sufficient ground to set aside the sale; *Building Asso.* v. *Silvy,* 4 Phila. 17 (D. C. 1860).

Where a *levari facias* in execution of a judgment on a

scire facias sur mortgage fails to describe the property as it stands at the time of sale it having been materially improved since the date of the mortgage the sale will be set aside. And if it appear by the depositions taken under the rule, that the character of the property is superior to the description in the hand bill the rule will be made absolute; *Trust Co.* v. *Herr*, 14 W. N. C. 390 (C. P. 4, 1884).

As to misdescription in general, see *Brown* v. *Sheppard*, 1 W. N. C. 103 (D. C. 1874); *Mole* v. *Doemer*, 1 Ibid. 113 (C. P. Phila. 1874), and *Moyer* v. *Ibbotson*, 2 W. N. C. 29 (C. P. 2, 1875). Inadequacy of price is not a cause for but an element in the case of a defendant who seeks to set aside a sheriff's sale. *Whitaker* v. *Berky*, 2 W. N. C. 470 (C. P. 1, 1876). For advertisement insufficient under the Act of Assembly a sale will be set aside. *Haas* v. *Fisher*, 10 D. R. 150 (Clearfield, 1901).

6. While "caveat emptor" applies to the purchaser at a sheriff's sale; *Herr* v. *Draucher*, 7 Lanc. L. R. 383 (1890); a mistake of law on the part of a purchaser at sheriff's sale as to the discharge of liens, will permit relief; *Vincent* v. *Hunsinger*, 7 Pa. C. C. 331. (Sullivan 1889). But a plaintiff in execution who failed to attend a sheriff's sale which discharged his lien cannot have the sale set aside for that reason: *Building Asso.* v. *Nesbitt*, 21 Pa. Super. Ct. 150 (1902).

7. On a rule to set aside sheriff's sale depositions must invariably be taken, unless, of course, the parties agree as to the facts formally so that the agreement may be made part of the record. Even if the irregularity complained of is patent in the advertisement it must be shown in evidence under deposition, it does not sufficiently appear by being averred in the affidavit in support of the rule not only because the affidavit is only available for the purpose of having this rule allowed, but because the advertisement is evidence and subject to contradiction or explanation.

A rule to set aside a sheriff's sale of personalty is of comparatively rare occurrence. The authority for it, before delivery of the goods is, however, expressly given by statute (act of 10th April, 1849, Purdon, 645, pl. 49), and it is sometimes used. See *Yocum* v. *Specht,* 1 W. N. C. 6 (D. C. 1874).

XV.

Whilst there is a theoretical procedure in the argument on the return or the hearing of a rule as stated, yet in many cases this is not adhered to and almost informality prevails, this is owing to the desire on the part of the court to thoroughly understand, not only the facts of the case but also the state of record, and course of pleading, as well as the view of the law held by the respective sides of the controversy. Side light often must be sought to render this comprehension complete, and facts not raised formally by the rule and answer—for often the cause required to be shown amounts to an answer—are presented by mere statement of counsel. It is here that the professional *status* of the lawyer is relied upon by the court. As the profession derives its dignity from its ecclesiastic origin it can only be maintained by the learning and personal character of the advocate. And while the spirit of the age does seem to have caused a departure from not only the forms and method of thirty years ago, but also a marked change in the ethics of the profession and although the practice of these days places it perilously near commercialism, we must remember that the aim of our calling is the administration, the effecting of justice; honest differing in the construing or statute or applying a principle of law to the particular facts of a cause, must occur and is the real motive of all litigation, but fairness in presenting of facts and exactness in stating the proposition raised by the law as to

the facts are essential to the successful and convincing argument.

Mistakes will happen, errors occur; but none that cannot be cured or at least mitigated, and all we do we must do with our might. Diligence, exclusive application, persistent industry is exacted of us all on bench or at bar by our profession. Personal integrity, purity of life cannot be omitted or ignored in any servants of the community and as we are entirely dependent upon the confidence of our fellow citizens we cannot win their esteem otherwise than by learning and zeal. Kindness and consideration for each other is demanded by the most necessary spirit of unity, but we must exercise care not to trade upon our privileges as lawyers. Courtesy to our adversary seldom imperils our client's case and frankness to the court is never wasted. The privileges of the lawyer to-day have descended to him from his clerical predecessors and as those privileges were bestowed upon the clergy out of respect to their calling, it is enough to consider their origin that we may see to it that we do not abuse them. Gilbert makes his Lord High Chancellor say in "Iolanthe:"

> "In other professions in which men engage,
> The army, the navy, the church and the stage,
> Professional license if carried too far
> One's chance of promotion must certainly mar,
> And I fancy this rule might apply to the Bar—"

We have a rich heritage capable of richer result, it is for all; let every one, then, do his part to develop his share so that in the great sum the whole people will be bettered by what we have done. It is fitting that we conclude with the final paragraphs of Judge Mitchell's address to the Law Academy, delivered on May 15, 1879, on "Motions and Rules at Common Law," itself the substance and foundation of this attempt.

"The members of the bar must come in constant contact with each other; for better or for worse they are tied together in their business relations so long as they pursue a common profession, and without a constant cultivation of the kindlier feelings, their intercourse must degenerate into an intolerable Ishmaelism. There is a line not always easy to be drawn, especially by a young man, between the sacrifice of clients' rights and the accommodation of adverse counsel. But it is a line which generally is soon learned, and in doubtful cases it is always well to lean to the amiable side. The accidents, and hardships, and difficulties of practice are such that the best and most careful practitioner has sometimes need to ask indulgence. A favor done seldom goes amiss, and if it is occasionally thrown away, there is always left the satisfaction of having at least done your part. The Philadelphia Bar have always been as celebrated for their courtesy towards each other, as for their learning and abilities. I am quite sure, gentlemen of the Law Academy, that you will not allow it to fall short of its established character in that or any other respect."

THE END.

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